THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, OCTOBER 8, 1875. { Hon. JOHN F. DILLON Contributing Editor.

PUBLIC SCHOOL TEACHER VERSUS PARENT.—In Morrow v. Wood, 35 Wis. Rep. 59–67, the plaintiff, a teacher in a public school, punished defendant's son for refusing to pursue a study which his father had forbidden. The defendant brought action for assault and battery, which action was discontinued. Whereupon plaintiff sued because of malicious prosecution. Judge Cole, in delivering the opinion of the Supreme Court, held that no authority over a pupil is implied as coming from the parent to the teacher; that the teacher can not prescribe a course of study contrary to the parent's wishes; nor has the teacher any authority to forbid a parent indicating his choice of studies for his son and insisting upon it. The chastisement of the child was pronounced unjustifiable.

ACTION FOR MALICIOUS PROSECUTION NOT ASSIGNABLE.—The case of Noonan v. Orton, in the Supreme Court of Wisconsin (12 N. B. R. 405–413), aims to distinguish between actions which pass to the assignee of a firm in bankruptcy, and those which do not. In this instance, one member of a firm, prior to the bankruptcy, brought an action for malicious prosecution, because of abuse of legal process in proceedings against the firm. The defendant answered that the plaintiff and his firm had been adjudged bankrupts, that an asssignee had been appointed, and, therefore, by the bankrupt act, the interest in the action passed to the assignee. Judge Lyon, in delivering the opinion of the court, held that this was an action for a personal injury, as distinguishable from an injury to property; that, just as assault and battery, libel, slander and the like, may occasion loss of property, and yet are all personal injuries, the same is true of malicious prosecution. The bankrupt act intends that the assignee shall take only the bankrupt's right of property. A tort must be for an injury to the property, in order to pass the right of action to the assignee. And further, it was held, that the cause of action was not assignable in law or equity; nor should the action abate, since it remained solely in the plaintiff.

THE "IDEAL REASONABLE MAN."—In the case of The People v. Newman, 10 Pacific Law Reporter, 21, the Supreme Court of California, has summoned from the vasty deep of metaphysical things the "ideal reasonable man" against which Dr. Wharton argues so sturdily in the second edition of his work on Homicide. The defendant was indicted and convicted of the crime of assault with intent to commit murder. There was no direct evidence tending to prove that he committed the offence, but there was circumstantial evidence having such a tendency. An instruction given at the request of the prosecution, contained the following propositions: "A sane man is conclusively presumed to contemplate the natural and probable consequences of his own acts; and therefore the intent to murder is conclusively inferred by the deliberate use of a deadly weapon, unless proved to have been done in self-defence or accidentally." "This," said Rhodes, J., in delivering the opinion of the court (with whom Crockett, McKinstry and Niles, JJ., concurred) "is erroneous. The intent to murder would not be conclusively inferred from the deliberate use of a deadly weapon, where the circumstances under which it was used were such as would excite the fears of a *reasonable man* that the person upon whom the deadly weapon was used was about to inflict upon him a great bodily injury, or to feloniously break and enter his dwelling-house. This error does not appear to be cured by the other instructions."

VALIDITY OF A WILL WRITTEN ON A SLATE.—The Pennsylvania statute of wills provides that "every will shall be in writing;" and the question has lately arisen in the case of Read v. Woodward, Common Pleas Court of Chester County, in that state (reported 8 Chicago Legal News, 1), whether a will written upon a slate is a good will. Butler, P. J., who delivered the opinion of the court, in holding that it is not, used the following language:

The writing is within the *terms* of the statute—for they are general, requiring simply that "every will shall be in writing." But it is within the *spirit?* For this enquiry also, is involved in the interpretation; and when considered we see plainly that *all* writing is not embraced. The purpose of the statute is obvious. It was to avoid the uncertainty and danger attending proof of nuncupative wills. Ordinary writing—as with the material in common use—serves to accomplish this purpose. Such other writing as does not, was not contemplated, and is not embraced. One may write in the dust, or the sand, or with charcoal or chalk, leaving the impression so evanescent that a breath will efface them. Such writing, though embraced by the terms of the statute, is excluded by its spirit. Then again, one may write on a rock or a wall, or a tree; and this also is excluded, for it is incapable of the use and treatment prescribed. We think it may be said with safety, that no writing effected with material not designed for, or suited to the purpose, is within the statute. It could not have been contemplated that men would so write.—But does the statute embrace *all* writing effected with material designed for the purpose? This proposition includes lead pencil and slate, for they are designed and prepared for writing. Here the enquiry is narrower and the question more difficult. Still, the true test—the adaptability of the writing to the end in view—is the same. If all such writing answers this end, then all is included. If a part does not, it is excluded. But the results of the test here, are not so marked as in the instances before stated. It may be said that the difference consists merely in the *degree* of appropriateness. The common judgment of men, however, as shown by almost universal experience, is against the fitness of lead-pencil and slate for writing of a permanent character. Deeds, leases, and all similar instruments are uniformly written in ink; and the judicial records of this country show no will in other material; while those of England show but two. Granting, therefore, that a will in lead pencil may, in some degree, answer the purposes of the statute, it may well be doubted whether the use of this material was contemplated. Under a statute similar to ours, the English Ecclesiastical Court have, however, admitted wills in pencil to probate: Dyer's Estate, 3 Ecc. Rep 92; Dickson v. Dickson, 1 Ecc. Rep. 222. Whether we will follow this lead is yet to be shown. In Patterson v English *et al.*, 21 P. F. S. 454, it is said that "no will should be written or signed with lead pencil, on account of the facility with which the writing may be altered or effaced." It may be remarked that the danger *here* from admitting such wills would be greater than in England, where the statute requires *subscribing* witnesses, and thus avoids the uncertainty attending proof of handwriting in pencil. But we think writing on *slate* presents even more serious objections. While it is true that this material is prepared and used for writing, it is true only in a limited sense. It is especially designed for figures, and is neither intended for nor adapted to, writing of a permanent character. It would hardly be thought of in this connection; and the reports here and elsewhere, show not a single instance in which it has been so used. Impressions upon it are easily removed, and replaced, without leaving any trace of the change. Writing upon such material does not in our judgment even reasonably accomplish the purpose had in view by the legislature, was not contemplated, and is not embraced in the statute. Judgment must, therefore, be entered for the defendant on the point reserved, notwithstanding the verdict.

Legislation Concerning Life Insurance.

The editorial comments of this Journal, p. 602, upon the legislative interference in contracts of life insurance proposed by Mr. Finch, exhibit clearly, yet at the same time dispassionately, some of the fallacies indulged in by that class of theorists represented by him. It is plain that such contracts are purely voluntary on the part of the assured, or the insured, as the case may be.

Yet it is a fundamental principle in the philosophy of Mr. Finch, that applicants for life insurance are under some such moral duress or coercion, that they need protection from the assaults or persuasions of "the companies;" protection such as is not vouchsafed by the government to any other class of parties to voluntary contracts.

There is another feature of the life insurance contract, as it exists in fact in America, which is wholly ignored by these philosophers, and to which I beg leave to call attention. Mr. Finch treats the interests of the life insurance company, and its policy holders, as being separate and distinct. Thus, he says, as quoted on p. 602 of this Journal, "If a company has dishonest agents, it, and not the policy-holders, should bear the losses sustained by their rascality."

And this is the burden of his song, and the reason which moves him to the advocacy of each and all his proposed legislative protections. But in America, where these are to be enacted, nearly all the life insurance corporations are mutual companies. There is in these cases no company besides the policy-holders; and the aggregation of the latter constitutes the company. When Mr. Finch talks of "the companies" in contradistinction to "the policy-holders," he uses language which conveys no meaning to candid minds, so far as our mutual companies are concerned. When a fair and honest legislator is asked to legislate so that "if a [mutual] company has dishonest agents, it, and not the policy-holders, should bear the losses sustained by their rascality," will he not be puzzled? Even our stock companies which insure lives, do so to a very great extent on mutual principles. The policy-holders participate in the profits, and are thus interested in the business and management of the company. To a certain extent the same considerations must apply to all such, as well as to the purely mutual companies.

In the latter, it is plain that the policy-holders and the company are identical; and that the central office or board which manages its affairs, and of whom many theorists are thinking when they denounce the "soulless corporations," is but a trustee for the careful and prudent management of the accumulated funds of many families, who are prospectively widows and orphans. I beg to suggest, though with diffidence, that any legislation on the subject will be partial, inequitable and fatally defective, which overlooks the fact that every mutual life insurance company is a partnership, in which no one policy-holder can be allowed the payment of a policy of insurance for which full compensation has not been made, except by defrauding to a certain extent other policy-holders of their just rights.

To illustrate by recent well known examples: In the case of Grigsby v. St. Louis Mutual Life Insurance Co., 2 C. L. J. 123, the court awarded the widow and orphan children of Grigsby the sum of three thousand dollars (less premiums and interest), and decreed that "the company" should pay it. In order to comply, the officers or trustees of the company must take the money, not out of their own pockets, but out of the pockets of other prospective widows and orphans. So in the case of Ohde v. Northwestern Mutual Life Ins. Co., 2 C. L. J. 567, the money awarded to the administrator of the widow could only be paid by the trustees of the company out of the moneys which otherwise belonged to other prospective Northwestern widows. No reference is here made to the law of these cases. The fact is simply referred to, that, conceding the law to be properly administered, the results of these cases work a hardship to policy-holders, unless it be a fact that the premiums actually paid have been adequate compensation for the policy. But Mr. Finch and like philosophers are elated when such a result is attained, without any reference to the rights of other members of the partnership; and they wish the legislature to secure similar results in all cases, by enacting that all policies shall be absolutely non-forfeitable.

"W. E.," in his letter to this Journal, p. 597, discussing Judge Sawyer's charge in Lee v. Guardian Life Insurance Co., p. 495, thus classifies all who discuss these questions. "There would seem to be three classes of thinkers upon the subject. The first say, that upon the known habits of insurance companies and their agents, and their known course of business, the *people* seem to need some protection against those plausible and well equipped solicitors. This class includes the Supreme Court of the United States, and the great majority of the state courts as before shown. The *second* class are those who say that the insurance companies, being great public benefactors, seem to need some protection against the people. This class includes the courts of Massachusetts and Rhode Island, who formed and announced a judicial policy in the premises under very different circumstances from those now existing, and will not change that policy to meet the new state of things. And the *third* class are those who, like Judge Sawyer, not only think the insurance companies need protection against their applicants, but also think they need protection against themselves, and their agents who are a part of themselves." This seems to me to be an arbitrary classification, made without any consideration of the peculiar constitution of most of our life insurance companies. When I think of "insurance companies" that are composed of all those of "the people" who become "applicants" and are accepted, and whose agents represent at the same time the new policy-holder and the aggregate of the old policy-holders, I am unable to see how one who would have strict and impartial justice administered to all parties to these contracts, can be put into either of these arbitrarily arranged classes.

It is a curious feature of the discussion concerning our modern contract of life insurance, that, whereas critics like "W. E." always profess to apply to it the rules of law governing other contracts and contracting parties in general, yet whenever reformers like Mr. Finch propose remedies for the rules they have discovered, the effect of every new rule is to take both contract and parties out of the rules already existing as to other people, and to govern them to that extent by a code applicable to life insurance alone. The body of our law has grown to proportions commensurate with the increased and increasing necessities of the advanced age we live in, simply by virtue of its elasticity. It has been found on examination to contain principles and rules of universal application, sufficient to guide and direct the courts on nearly all

cases of new impression arising out of the railroads, telegraphs, banking systems and new styles of commercial contracts which this fast age has produced. May we not hope to see most of the vexed questions in life insurance yet settled by careful reference to those venerable rules governing other contracts, when we have first thoroughly examined and investigated the life insurance contract, so as to see what it really is? And until the courts have so thoroughly examined that contract, as to show us in their decisions that they fully understand it, and to indicate its defects so clearly as to satisfy the candid and unprejudiced mind, will not any legislation on the subject be hasty?

While writing these lines, I have received the Journal for September 24, in which I find at p. 618, the comments of "Insurance" upon the Ohde and Grigsby cases. They furnish some of the reasons which insurance actuaries may advance in behalf of other policy-holders, against the decisions rendered in those cases, and illustrate the views I have endeavored to present. The arguments used by "Insurance" should be presented to and considered by any legislature that is asked to deal with this subject. Is it urged in reply that these are abstruse actuarial calculations, which are beyond the understanding of the ordinary legislator? Then the ordinary legislrtor, if a man of honor and conscience, should wait with "hands off," until he does understand them. Neither courts nor legislatures can arrive at the true equities between the different members of one of these modern partnerships in life insurance, without an understanding of the amount of insurance which any given premium will equitably pay for, and the time for which it will pay, the extent to which "days of grace" may equitably be allowed, and the length of time, wit in which restoration of a lapsed policy may equitably be permitted. It may be found on close scrutiny that every legal technicality in the modern policy, of which we are so fond of complaining, when it seems to bear harshly upon the holder of the particular policy, has been prompted by a careful regard for the unquestioned equities of the holders of other policies in the same partnership. J. O. P.

MEMPHIS, Sept. 27, 1875.

Life Insurance — Suicide.

THE KNICKERBOCKER LIFE INSURANCE CO. v. MAGDALENA PETERS.*

Court of Appeals of Maryland, April Term, 1875.

1. **Unintentional or Accidental Death.**—The policy clause providing that it shall be void, if the insured "shall die by his own hand or act," is not vitiated by an unintentional or accidental taking of life. Opinions are irreconcilably in conflict as to its true construction in other respects.

2. **Self-Destruction in Fit of Insanity.**—The court below instructed that self-destruction in a fit of insanity which overpowered the conciousness, reason and will, from a mere blind and uncontrollable impulse, or impelled by an insane impulse which the reason left to the insured, did not enable him to resist, will not avoid the policy. It must be presumed that he was not impelled by any such impulse in the absence of evidence to the contrary, and such evidence must relate to the precise time of the occurence, if he was only subject to fits of insanity. It is not sufficient to prove merely that the insured was insane at times; he must be proved insane at the precise time when the act was committed, and in the absence of such proof it must be presumed that he was then sane, and they cannot draw an inference that he was insane from the fact that he destroyed his own life. *Held*, that these instructions stated the law more explicity and favorably for the insurer than any American authority brought to the attention of the court, and a finding of the jury that the insured killed himself in a fit of insanity, as stated in these instructions, if supported by evidence, must be conclusive against the insurer.

*From the report in the Insurance Law Journal.

Marshall & Fisher, for appellant; *J. Alex. Preston*, for appellee.

Opinion by MILLER, J.

The insurance company defends this action under the clause in the policy which makes it void if the assured "shall die by his own hand or act." It is now too well settled to admit of question that this clause is not to be construed as comprehending every possible case in which life is taken by the party's own act. For instance, all authorities concur in the view that an unintentional or accidental the taking of life is not within the meaning and intention of the clause. Thus, if by inadvertence or accident, a party shoots himself with a gun or a pistol, or takes poison by mistake, or in a sudden frenzy or delusion tears a bandage from a wound and bleeds to death, in the literal sense of the term he dies by his own act; yet all the decisions agree that a reasonable construction of the proviso, according to the plan and obvious intention of the parties, would exclude such cases from its operation. There is much conflict of judicial opinion as to what in other respects is its true construction. The English courts have determined that the clause includes all intentional acts of self-destruction, whether criminal or not, and that insanity, in order to prevent the clause from operating, must have progressed so far, or be of such a character, as to render the party unable to appreciate and understand the nature and physical consequences of the act he was committing, and that the question whether he was at that time in a state of mind to be morally and legally responsible for his acts is immaterial. Borradaile v. Hunter, 5 M. & G. 639; Clift. v. Schwabe, 3 M., G. & S. 437. The rejection of this latter consideration met, however, with the strong dissent of some of the ablest of the English judges. C. J. Tindal, C. J. Pollock and Cresswell and Wightman, JJ., held that looking at the words themselves, and the context and position in which they are found, a felonious killing of himself and no other was intended to be excepted from the policy.

That was the construction placed by C. J. Tindal upon the proviso in Borradaile v. Hunter, and the clause before us is equally open to the same application of the maxim *noscitur a sociis* and to the same answer that was given to it by a majority of the court in that case.

There is also a diversity of opinion upon the same subject in this country. In Dean v. American Mutual Life Insurance Company, 4 Allen, 96, the court in a very elaborate opinion by C. J Bigelow, which is generally considered as adopting and following Borradaile v. Hunter, use this language: "If the death was caused by accident, by superior and overwhelming force, in the madness of delirium or under any circumstances from which it may be fairly inferred that the act of self-destruction was not the result of the will or intention of the party adapting the means to the end, and contemplating the physical nature and effects of the act, then it may be justly held to be a loss not excepted within the meaning of the proviso. A party can not be said to die by his own hand, in the sense in which these words are used in the policy, whose self-destruction does not proceed from the exercise of an act of volition, but is the result of a blind impulse, or mistake, or accident, or other circumstances over which the will can exercise no control. And in the more recent case of Cooper v. Massachusetts Insurance Company, 102 Mass. 227, the same court declares that this limitation is in substance the same as that which the English cases have adopted. In Easterbrook v. Union Mutual Life Insurance Company, 54 Maine, 224, the judge at the trial instructed the jury, that if the insured was governed by irresistible or blind impulse in committing the act of suicide, the plaintiff could recover, and the jury found specially that the self destruction was the result of a blind and irresistible impulse over which the will had no control, and was not an act of volition. The court, in a well reasoned opinion by Chief Justice Appleton, after concurring in the construction of the clause and views expressed by Chief Justice Tindal in Borradaile v. Hunter, add: But whether these views are correct or not, the defendants had the benefit of instructions in entire conformity with the law as

stated by the Supreme Court of Massachusetts in Dean v. American Mutual Insurance Company, and the jury have found the fact such as in accordance wi h the law of that case would justify their verdict. The Court of Appeals of New York, in Van Zandt v. Mutual Benefit Life Insurance Company, 55 N. Y. Rep. 169 (3 Insurance Law Journal, 208), admit the clause would not apply if the party committed the act under the influence of some insane impulse which he could not resist; but insist that no court has gone so far as to adjudicate that the mere want of capacity to appreciate the moral wrong involved in the act, where it was voluntary and intentional, unaccompanied by any want of appreciation of its physical nature and consequences, or by any insane impulse, or want of power or will or self control, is sufficient to take the case out of the proviso; that the prevailing opinion in Breasted v The Farmers' Loan and Trust Company, 4 Selden, 299, did not undertake to overrule Borradaile v. Hunter, and Clift v. Schwabe; and that in Life Insurance Company v. Terry, 15 Wallace, 580, the question of the capacity of the deceased to appreciate the moral character of the act was not involved, and all that is said on that subject in the opinion is *obiter*. Whether this be a just criticism upon the judgment of the supreme court, or whether—if that high tribunal did definitely adjudicate in the case referred to, that inability to appreciate the moral character of the act, or to distinguish between right and wrong, prevents the operation of the clause—such be its just and true construction, are questions upon which we express no opinion, because in our judgment the case before us falls clearly within the line of adjudications which have adopted and followed the law of the English cases.

The act of self-destruction in this case was by hanging, and in granting the plaintiff's two prayers the court instructed the jury that the clause in question would not prevent a recovery if they found from the evidence, first that deceased killed himself in a fit of insanity which overpowered his consciousness, reason andwill, and thus acted from a mere blind and uncontrollable impulse, or second, that he killed himself in a fit of insanity impelled by an insane impulse he could not resist. They were also further instructed, at the instance of the company, and by the court in modifying one of the defendant's prayers, first, that if they found the deceased destroyed his own life, then they should find for the defendant, unless they believe from the evidence that he was at the time of such self-destruction impelled thereto by an insane impulse which the reason left him did not enable him to resist, and the presumption is that he was not impelled thereto by any such impulse, in the absence of evidence to the contrary, and such evidence must relate to the precise time of the occurrence if he was only subject to fits of insanity. Second, that after they are satisfied he died by his own hand, it becomes incumbent on the plaintiff on her part to offer proof sufficient to prevent the operation of the clause, and she does not comply with such exigency by proof merely that he was insane at times; she must prove that he was insane when the act was committed, and in the absence of proof of his condition at the precise time when the act was committed they must presume he was then sane, and they can not draw an inference that he was insane from the fact that he destroyed his own life.

These instructions state the law more explicitly and more favorably for the insurer than is found in any of the American authorities to which we have referred or to which our attention has been called in argument. They exclude altogether the idea of any exercise of volition in the commission of the act, and the power to refrain from doing it. If a man's consciousness, reason and will are overpowered, and he is impelled to the act by an insane impulse which he can not, or which the reason he has left does not enable him to resist, how can it be any more justly said that the resulting death was by "his own hand or act," than if he had killed himself by accident or mistake? Were it possible for one in that condition and acting under such an impulse, to possess sufficient power of mind and reason to understand the physical nature and consequence of the act, and to have a purpose to cause his own death, still, as he is deprived of all power of resistance he does the act involuntarily, and it is impossible to call it "his voluntary and willful act." In our opinion the instructions given cover this part of the case and state the law most favorably for the defence. There was consequently no error in the rejection of the appellant's other prayers on the same subject.

But special exception was taken to the plaintiff's prayers, upon the ground that there was no evidence to sustain them and substantially the same question is presented in some of the defendant's rejected prayers. We have carefully examined the testimony in the record on the subject, and are unable to say (as we must to sustain this objection) there was no evidence legally sufficient to authorize a jury to infer and find that the deceased killed himself in a fit of insanity, as stated in these instructions.

JUDGMENT AFFIRMED.

Libel—Pleading—Evidence — Words Imputiug Adulterous Intercourse.

CASSIUS M. STRADER *ET AL.* v. BENJAMIN T. SNYDER.*

Supreme Court of Illinois, January, Term, 1873.

Hon. SIDNEY BREESE, Chief Justice.
Hon. PINCKNEY H. WALKER,
" ALFRED M. CRAIG,
" JOHN SCHOLFIELD,
" JOHN M. SCOTT,
" BENJAMIN R. SHELDON,
" WILLIAM K. MCALLISTER.
} Associate Justices.

1. **Pleading—Demurrer—To what Pleas Directed.**—To an action on the case for libel, the defendants pleaded the general issue on two special pleas. The plaintiff demurred to two of the pleas, describing them as pleas *one* and *two*, and assigning as cause of demurrer that they amounted to the general issue. The court sustained the demurrer to the two special pleas, which were the second and third of the series, and this was assigned for error: *Held*, that the decision was correct, as the court will always look at the body of any pleading for the purpose of determining its character, and to what it is directed.

2. ——. **When Plea amounts to the General Issue.**—A plea in an action on the case for libel, purporting to answer the whole cause of action, where the justificaiction attempted to be set up is not as broad as the imputation upon the plaintiff's character, and which consists principally in mere denials of allegations of the declaration, either directly or argumentatively, is bad on demurrer as amounting to the general issue.

3. **Evidence Secondary in case of Libel**—It is erroneous to admit in evidence a libelous article from a newspaper, in a suit against the parties who wrote the original and procured its publication, even though it was published substantially according to the manuscript. The original should be produced, or its absence accounted for. But if the defendants afterwards put in evidence such original, the error will be cured.

4. **Libel—Variance in the Written Article and that as Printed.**—In a suit against the author and those procuring the publication of a libelous communication in a newspaper, it appeared that the article, as published, contained some slight verbal alterations from the manuscript, but not such as to alter the sense. The court refused to instruct the jury that, unless the phraseology of the two were the same, there could be no recovery: *Held*, no error, as a mere verbal alteration, not affecting the sense, would not exonerate the defendants. To have that effect the alterations must be material. The materiality of the manuscript as evidence was only upon the question of agency of the defendants in procuring the publication.

5. **Evidence—When objection to, should be specific.**—In a suit for libel, where the defendants had gone extensively into parol and secondary evidence of the contents of the original manuscript article which had been published, and which was in their possession, the plaintiff called a witness who had seen the original, and who testified to its contents without objection, and asked him: "Did you understand who this article referred to?" The defendants objected generally to the question, but the court allowed it to be answered, and the witness said he thought it referred to the plaintiff. *Held*, that as the defendants had introduced much similar evidence, they should have objected specially, and then the objection might have been obviated by notice to produce the original.

6 ——. **In Mitigation of Damages in Libel—Reputation of Plaintiff.**—On the trial of a suit for libel imputing adultery to the plaintiff with a negro woman, the general issue alone being filed, the defendants offered to prove, in mitigation of damages, that before and at the time of publishing the alleged libel, the plaintiff was generally reputed and believed among his neighbors to be the father of the colored child referred to in the article: *Held*, that such evidence was not admissible under the general issue, for any purpose.

*From advance sheets of 67 Illinois Reports, received through the courtesy of the official Reporter, Hon. Norman L. Freeman.

7. **Libel—Whether Words Impute Adultery.**—In a suit for libel, the words set out were: "We see in the columns of the Macomb Journal of the 24th, an article under the blood and thunder heading of 'Middletown Mass Meeting, and excitement over the burial of a colored child.' 'A fight proposed, and the wilting down of the belligerents.' The colored child in question is supposed to be the offspring of a Mr. Snyder, formerly of Macomb. The Journal article, from beginning to end, is a wilful lie. The author says the meeting was held in a blacksmith shop—a lie! The truth is, Snyder lied to get his 'miscegen' in the graveyard, and, when this was found to be the case, the citizens of Middletown, both republicans and democrats, met at the graveyard to investigate the matter, and the circumstances showed that Mr. Snyder, with ridiculous intentions, had misrepresented the facts concerning the child, and thereby obtained permission to bury his illegit mate 'production' in our burying ground." *Held*, that the words did not, in their common acceptation, and without the aid of extrinsic matters, impute to the plaintiff an act of adultery, much less with the negro woman to whom they were alleged to apply.

8 **Same—Pleading and Evidence—When the Allegations must be strictly Proven**—In an action for libel, where the words are not actionable *per se*, but are in connection with extrinsic matters which are set forth in the declaration such matters are material, and the allegation that the slander applies to such extrinsic matter, is matter of description, and must, in general, be proved as laid, though unnecessarily minute.

9 Where the plaintiff introduces into his declaration for libel or slander extrinsic matters, and alleges that the words set out applied to them, in order to support his *innuendo* he is bound to prove such matters, and show the application as alleged.

10 **Same—Office of Innuendo**—The office of an *innuendo*, in actions for slander and libel, is to ascribe a particular meaning to the words complained of, and such meaning becomes a part of the issue and material, so that the plaintiff can not, on the trial, reject such meaning and resort to another.

Appeal from the Circuit Court of McDonough County; the Hon. CHAUNCEY L. HIGBEE, Judge, presiding.

This was an action on the case, by Benjamin T. Snyder, against Cassius M. Strader, Robert Myres and Richard Cracraft, for, libel. The facts of the case appear in the opinion. A trial was had in the circuit court, resulting in a verdict and judgment in favor of the plaintiff for $215, and the defendants appealed.

Mr S. Corning Judd, for the appellants; *Mr. D. G. Tunnicliff*, for the appellee.

Mr JUSTICE MCALLISTER delivered the opinion of the court:

This was *case*, brought in the McDonough Circuit Court by appellee against appellants, for an alleged libel published in a newspaper called the "Macomb Eagle," as it is claimed, by the procurement of appellants, and imputing to appellee the charge of adultery with a negro woman, particularly described. The declaration contained four counts, each setting forth certain introductory matter to support the *innuendo* of adultery, as above stated, setting out the words, and averring that the words set out applied to such introductory matter, which were followed by said *innuendo*. The pleas were, the general issue and two special pleas in justfication. To the special pleas a demurrer was interposed, which was sustained and the case tried upon the general issue. Verdict and judgment for plaintiff, and appeal taken by defendants to this court.

The first error assigned, questions the correctness of the decision of the court in sustaining the demurrer, on these grounds: (1), the demurrer did not extend to both special pleas, and the court sustained it to both; (2), the pleas were both sufficient in law Neither of these grounds is tenable. It is true, in the commencement of the demurrer the pleas are described as *one* and *two*, and, in the order of filing, the general issue was first. But the special cause assigned was, that said pleas, and each of them amounted to the general issue. The court may always look at the body of any pleading for the purpose of determining its character, and to what part of the pleadings it is directed. As the only cause of demurrer specified was, that the pleas and each of them, amounted to the general issue, and as no rational pleader would assign that cause in a demurrer to the plea of general issue, the court applied the demurrer to the special pleas, and defendant's counsel acquiesced by not objecting, and going to trial upon the general issue. This objection we regard as frivolous. The pleas were so clearly bad, that we shall not stop to analyze them. They purported to be an answer to the whole cause of action, and the justification attempted to be set up was not as broad as the imputation upon plaintiff's character, and they consist principally in mere denials of allegations of the declaration, either directly or argumentatively, which amount to the general issue.

The next point made is, that the court permitted plaintiff's counsel to read the newspaper in evidence without first producing the original manuscript from which it was published. The defendants were in no way connected with the newspaper establishment. The article in the paper purported to be a communication signed by each of defendants. The evidence tends to show that Cracraft, one of the defendants, prepared for the purpose of publication, a manuscript, which the other two defendants signed, and Cracraft put it into the hands of Dr. Fugate to copy, with directions to sign his, Cracraft's name, to it when copied. The evidence tends to show that this was done, and the manuscript, so copied, was sent to the editor of the paper, and that the other defendants admitted that they had signed it. Evidence was also given tending to show that, in setting up the article, there were changes made in the phraseology, but none altering the sense in respect to the alleged libelous words. It also appeared that the defendants' counsel had the manuscript in their possession at the trial, and afterwards introduced it in evidence. But they have not preserved it in the bill of exceptions.

In Adams v. Kelly, Ry. and Mo. N. P. C. 157; 20 E. C. L. 403, where a reporter to a newspaper proved that he had given a written statement to the editor of the paper, the contents of which had been communicated to him by the defendants for the purpose of such publication, and that the newspaper then produced was exactly the same, with the exception of some slight alterations not affecting the sense; it was held that what the reporter published in consequence of what passed with the defendant, might be considered as published, by the defendant but that the newspaper could not be read without producing the written account delivered by the reporter to the editor. This rule is entirely comformable to the general rule of evidence, and goes upon the ground that what the reporter stated as to the article in the newspaper being exactly the same was secondary evidence, while his written account was the higher and better evidence, and should be produced. That rule would apply here, but we think the subsequent production of the manuscript, by the defendants, cured the error. Deshler v. Beers, 32 Ill. 368.

As connected with this branch of the case we will here notice another point relied upon below and strongly urged here. Defendants' counsel asked the court to charge the jury, in substance, that unless the words and phraseology of the manuscript were identically the same as in the newspaper article, there could be no recovery. This instruction was refused, and, we think, properly. The action was brought for the words published in the newspaper, not those in the manuscript. The materiality of the latter as evidence was only upon the question of the agency of the defendants in the procurement of the former; in short, it was for the purpose of showing that the newspaper article was published in consequence of the production by the defendants of the manuscript for the purpose of being published. In this view, mere verbal alteration, not affecting the sense, would not exonerate. To have that effect the alterations must be material. We have not been able to find any case exactly parallel, but in Rex v. Hall, 1 Strange 416, the principle is clearly recognized. That was an information for a libel; the witness for the crown produced the libel and swore that it was shown to the defendant, who owned himself the author of the book, *errors of the press and some small variations excepted*. The counsel for the defendant objected that this evidence would not entitle the Attorney-General to read the book in evidence, because the confession was not absolute, and therefore, amounted to a denial that he was the author of that *identical* book. But Pratt, Ch. J., allowed it to be read, saying, he would put it upon the defendant to show that there were *material* variances

The manuscript not having been preserved in the bill of ex-

ceptions, we can not determine whether there were, in fact, material variances, but the court was right in refusing to instruct that the words and phraseology must be identically the same as in the newspaper.

The plaintiff introduced one Vorhees as a witness, who testified that he saw the manuscript in Dr. Fugate's hands and read it. He could not say that it was the same as that in the newspaper. His best recollection was that it was about the same. All this was admitted without objection, and the following question was asked: "Did you understand who this article referred to?" To this defendants objected generally, and the court overruled the objection. Witness answered: "I think it referred to the plaintiff, Mr. Snyder." It is now insisted that the exception taken to this evidence should have been sustained. This question called for the witness' understanding of the manuscript, which had not been produced nor its non-production accounted for in any legal way. But it was, in fact, in the possession of the defendants, who had already gone extensively into parol and secondary evidence of its contents. Having done so, they should have objected specially when plaintiff introduced the same kind of evidence Then plaintiff's counsel might have given them notice to produce the manuscript, which was in their possession at the trial, and they would have been compelled to produce it or submit to the introduction of secondary evidence of its contents.

The defendants offered to prove in mitigation of damages, that before and at the time of publishing the alleged libel, the plaintiff was generally reputed, and believed among his neighbors, to be the father of the colored child in question. Upon objection by plaintiff's counsel, the offer was excluded and exception taken. This is relied upon as error. It is the settled law of this court that such evidence is not admissible under the general issue, for the purpose of mitigating damages, or any other purpose. Young v. Bennett, 4 Scam. 43; Regnier v. Cabot, 2 Gilm. 34; Sheahan v. Collins, 20 Ills. 325. The portion of the newspaper article containing the words set out in the several counts of the declaration, and read in evidence by plaintiff, is as follows.

"For the Macomb Eagle.

"FROM MIDDLETOWN—THE OTHER SIDE OF THE STORY—THE COLORED TROOPS FOUGHT NOBLY.

"MIDDLETOWN, ILL., June 27, 1870.

"*Editor Macomb Eagle:*

"We see in the columns of the Macomb Journal of the 24th an article, under the blood-and-thunder heading of 'Middletown mass-meeting, and excitement over the burial of a colored child—A fight proposed, and the wilting down of the belligerents,' The colored child in question is supposed to be the offspring of a Mr. Snyder, formerly of Macomb. The Journal article, from beginning to end, is a wilful lie. The author says the meeting was held in a blacksmith shop—a lie! The truth is, Snyder lied to get his 'micegen' in the graveyard, and when this was found to be the case, the citizens of Middletown, both republicans and democrats, met at the graveyard to investigate the matter, and the circumstances showed that Mr. Snyder, with ridiculous intentions, had misrepresented the facts concerning the child, and thereby obtained permission to bury his illegitimate 'production' in our burying ground."

As we have before said, the declaration in each count, for the purpose of applying the alleged defamatory words, and to support the innuendo that they meant to impute a charge of adultery on the part of plaintiff with a particular negro woman, set out, as extrinsic and introductory matters, in substance, the following: That, at the time when, etc., the plaintiff was a married man, living with his wife, who was a white woman, and having white children as the issue of such marriage; that at said time, when, etc., and for several weeks before, he had in his employ as a servant, doing housework, a certain negro woman who was not, and never was his wife; and that said negro woman, at the time she came into such employment, had with her a certain negro child of tender age, to-wit: of the age of two years, not the child of plaintiff, but which said negro woman claimed as her child, and which child said negro woman kept at plaintiff's house until shortly before said time, when, etc.; when said child died and was buried in a graveyard in plaintiff's neighborhood, near the town of Middletown; that after such burial, and before said time, when, etc., there had been a meeting of the citizens in the neighborhood, and an article was published in the Macomb Journal, a newspaper published in said county, of and concerning said meeting of said citizens, and headed "Middletown mass-meeting, and excitement over the burial of a colored child—a fight proposed, and the wilting down of the belligerents"

The declaration then proceeds in each count to set out the alleged libelous words and apply them to said several extrinsic matters, following with the innuendo that plaintiff was guilty of adultery with said negro woman.

Where an averment of extrinsic matter is material, the allegation that the slander applies to such extrinsic matter is matter of description, and must, in general, be proved as laid, though unnecessarily minute. 1 Chit. Pl. 401; 1 Greenlf. Ev. sec. 58; 3 Ib. sec. 413.

It is quite too plain for argument, that the words set out do not, in their common acceptation, and without the aid of the extrinsic matters, impute to plaintiff an act of adultery, much less with the negro woman to whom they are alleged to apply. Patterson v. Edwards, 2 Gilm. 720.

The court below refused all instructions asked by the respective parties, and, of his own motion, gave the following:

"The words set out in the declaration amount to a charge of adultery, or fornication, and are actionable; and if the jury believe, from the evidence, that the defendants caused or procured the article published in the Macomb Eagle, and read in evidence, to be published in said paper, and that the same was published in reference to the plaintiff, and if no subsequent part of said article read in evidence by defendants so qualified said article as to show that said *crime* of adultery or fornication was not intended to be imputed, then the law would imply motive, and the plaintiff would be entitled to recover at least nominal damages."

The direct effect of this instruction was to relieve the plaintiff from the necessity of proving, and the jury from passing upon the extrinsic matters introduced, to which the declaration alleged that the words set out applied, and to allow the plaintiff to resort to another meaning to such words than that ascribed by his innuendo. This was a departure from well established rules. The plaintiff having introduced such extrinsic matters, and alleged that the words set out applied to them, in order to support his innuendo, was bound to prove such matters and show such application as laid and alleged. And having, by his innuendo, ascribed a particular meaning to the words, he was not at liberty to reject that meaning upon the trial, and resort to another. The innuendo gave a character to the libel, which became a part of the issue. Stowell v. Beagel, 57 Ill. 97.

For this error the judgment must be reversed and the cause remanded. JUDGMENT REVERSED.

Foreign Selections.

THE VARIATION OF CONTRACTS AS AFFECTED BY THE STATUTE OF FRAUDS.—We propose calling the attention of our readers to a case recently decided in England, which is of some use, as showing in a clear and forcible manner the strict interpretation which is placed by our courts of law upon this celebrated statute, and which may, perhaps, suggest some doubts as to the expediency of so stringent an interpretation of its enactments. The facts of the case to which we refer (Saunderson v. Graves, L. R. 10 Exch. 234) were as follows:—The plaintiff had entered into an agreement in writing with the defendant to let him a public-house, as tenant from year to year, with option on his part to call on the plaintiff to grant him a lease of the house for twenty-eight years, upon the terms, amongst

others, that if he sold the lease for more than £1,200, he should give the plaintiff half the difference. The plaintiff having granted him a lease of the house, which the defendant sold for £2,500, brought an action against him upon the agreement, to recover half of £1,300. The defendant defended himself by relying on the Statute of Frauds; he contended that the lease to him was under a substituted agreement, which was not in writing, so as to satisfy the statute. The lease granted differed from that specified in the written agreement, in the following particulars:—The term was for thirty two years, instead of twenty-eight. The rent was £105, instead of £100. The premium was £800, instead of £1,200. There was, also, no covenant against assignment without the lessor's consent, nor one binding the lessee to take his beer from the plaintiff, as in the original agreement. Those differences were the result of objections by the defendant, yielded to by the plaintiff, who on his part, required the additional rent. The jury found, however, that the stipulation as to dividing the profit remained in force, or was renewed. Such a verdict was a perfectly natural one on the part of a jury, and we venture to assert that it would be next to impossible to induce any person of ordinary intelligence to come to any other conclusion on the equitable merits of the case. We think we may assert, without fear of contradiction, that in this case at any rate, the technical requirements of our law were such as to defeat natural justice, which should be the foundation of every code of laws. On the case being brought before the English Court of Exchequer by the defendant, the plaintiff relied on the authority of a dictum of Chief Justice Tindal, in Souch v. Strawbridge, 15 L. J. (C. P.) 170, that the statute does not apply to executed contracts. Mr. Baron Bramwell, in giving judgment, refused to be bound by that as an authority, so far at least as to extend it to all cases which fall under the 4th section; "For," he observed, "as to some of them, the question cannot arise till the contract is executed—*e. g.*, cases of guarantee, and cases of consideration of marriage. There are cases where, when the thing is executed, a defendant might be liable—*e. g.*, on a contract to paint and deliver a picture on, and not before a day distant more than a year. If, at the time appointed, the person ordering the picture took it, he would have been held to have renewed his promise from that moment. So, in any other case where the law would imply a promise of doing anything by the promisor. But, the law implies no such promise as that relied on here on the granting of a lease. It is said that this is hard and grossly unjust. No doubt the Statute of Frauds always is in cases where the consideration is executed—of guarantee, for example—and often where the consideration is executory, but the hardship must be borne for the sake of the rule." While we agree perfectly with the observations of his lordship as to the harshness of the rule, we must beg very respectfully to differ "*toto cælo*" with his concluding remark. His lordship acknowledges that an injustice takes place, and yet he is prepared to continue doing that injustice. To obtain what end? To conform to a technical rule of law, framed by the judges themselves in construing an ancient act of Parliament.

In our opinion, there is no special sanctity to be attached to rules of this sort; so long as they conduce to the administration of justice between man and man, by all means let them be respected, but, so soon as they can show no better reason for their existence than that they *are* rules, and that it can be clearly shown that justice will be defeated by their strict observance, let them give way to the requirements of justice. Why should not there be a presumption of law in a case of this sort, as well as in the case put by the learned judge of the picture, that there was an implied promise? In neither case is there any written evidence of a promise. Why should the law voluntarily close its eyes to the real facts which were clearly proved to have existed in the present case? Where a party has beneficially enjoyed an advantage arising out of a contract, we do not think that it would be a violent straining of the law to presume a promise on his part. We are inclined to think that the distinction, between the case put by his lordship and the case actually before him, will not hold if weighed in the balance of equity, which has generally been supposed to be superior to mere technicalities in tribunals actuated by the spirit of the present day. The next point insisted on by the plaintiff was that the alterations made in the agreement were not of such a nature as to remove it from the benefit of the original agreement, which was in writing, as required by the statute. The plaintiff here seems to have principally relied on a dictum of Mr. Justice Gaselee in Hoadley v. M'Laine, 10 Bing. 489. He observes:—"Unless we establish that every alteration introduced in the progress of an executory contract is to constitute a distinct bargain requiring a distinct note in writing, there is no variance. If we were to hold otherwise, every building contract would be avoided by every addition." To this last observation of Mr. Justice Gaselee, the court in the present case replied:—"It is observable that a building contract is not, as such, within the statute, and but for that statute the question cannot arise." The court, in deciding against the plaintiff, was influenced by what was laid down in Goss v. Lord Nugent, 1 B. & Ad. 58. "The written contract is not that which is sought to be enforced, it is a new contract which the parties have entered into, and that new contract is to be proved partly by the former written agreement, and partly by the new verbal agreements;" in consequence of which it was held in that case that the new agreement did not comply with the statute Mr. Baron Bramwell, in giving judgment in the present case, observed as to this point:—"Next, it is said that it is of continual occurrence, in sales of property, that some alteration is made—one piece of land substituted for another—and that, if that which is contended here is right, such arrangements could not be enforced. I agree they could not. It is quite certain that neither party could have enforced against the other the taking or granting of this 32 years' lease. It is granted on the terms contained in it; no collateral agreement in relation to it not in writting can be enforced." Mr. Baron Amphlett intimated that, had there been anything in writing to show that the lease granted was accepted in substitution for that originally stipulated for, the action might have been maintained. In this point, also, we are rather of opinion that the decision of the court stretched the statute too far, and that greater weight should have been attached to Mr. Justice Gaselee's remarks. But one thing, we fear, is certain, that if interpretation of this sort be placed upon this act, it will cease to deserve its title—"*An act for the prevention of many fraudulent practices.*" Such an effect, we are glad to observe, was avoided in another very recent case, where an unexceptionable construction was given to the statute by the English Court of Common Pleas. In the case referred to, Hickman v. Haynes and others, 32 L. T (N. S) 873, it appeared that, in March, 1873, the plaintiff, by contract in writing, agreed to deliver, and the defendants to accept, 100 tons iron by monthly instalments, during March, April, May and June. After 75 tons had been delivered, it was verbally agreed, in the month of June, that the time for further delivery should stand over. In August, the plaintiff, in writing, requested the defendants to accept the instalment of 25 tons then due, and the defendants refusing, sued them within a reasonable time after such written request, for non-acceptance of such instalment The defendants relied upon the statute of frauds; but, it was held that the plaintiff was entitled to recover — the court holding that the proposition, that a party to a contract should discharge himself from his own obligations by inducing the other party to give him time for performance, would enable the defendants to make use of the statute of frauds not to prevent a fraud upon themselves, but to commit a fraud upon the plaintiff.—[*Irish Law Times.*

RIGHTS OF SURFACE-OWNER TO SUPPORT FROM SUBJACENT MINES.—When one man is owner of the surface, and another of the mines underneath, the question often arises whether or not

the latter, in working his mines according to the usual and proper mode of working, may let down and damage, or even destroy, the surface.

In considering this question it is material to ascertain, if we can, whether, independently of any express contract between the parties, there is any presumption of law in favor of the surface owner. Authority can be found in many cases down to a very recent period for maintaining that there is always a *prima facie* presumption that the surface is entitled to be supported at the expense of the mine; but we think that, upon the principle laid down by the highest tribunal, there is no such general presumption. The fact is that most of the cases in which the question of right to support has arisen, and particularly the earlier ones, have been cases where the mine and surface owner have been respectively in the relative positions of grantor and grantee; and where, therefore, the rule of construction, reading everything most favorable to the grantee, operated in favor of the surface owner; and this, we think, has in a great measure strengthened the impression that there is always a presumption in his favor.

Vice-Chancellor Malins, in the case of Wakefield v. The Duke of Buccleuch, 36 Law J. Rep. (N. S.) Chanc. 763, clearly held that the general presumption existed. He said (p 775): "Upon principle, and apart from authority, I should say that the surface, having at all times been enjoyed by man, must be protected at the expense of the mines, which have never been so enjoyed—that is, that the mines, in my opinion, must be regarded as a tenement subservient to the surface." But that view was certainly not acquiesced in by the Lord Chancellor or Lord Chelmsford, who gave judgment in the same case in the appeal to the House of Lords (39 Law J. Rep. (N S.) Chance. 441). After referring to it, the Lord Chancellor (Lord Hatherley) said (p. 451, Law J. Rep.): "That certainly is a general proposition which, I confess, does not help one much to a solution of the case. The rights of the parties, I apprehend, must be determined according to what we find in the instruments creating these rights, or in the customs, if there be any, which may be proved in support of these rights. I apprehend that these rights can not be rested upon any such abstract proposition as that." And Lord Chelmsford (at p. 454) said: "It is difficult to imagine a case in which this principle can be thus abstractedly applied. The surface of the land and all beneath it must originally have been the property of one and the same person. He was, of course, at liberty to grant the surface, reserving the minerals; or grant the minerals only, reserving the surface. In either case the grant might be made upon conditions which would be proved by the grant itself, or established by evidence of the invariable exercise of the respective rights of the parties. If no proof could be given of the mode in which each party was to enjoy his property, the owner of the surface might prevent the owner of the mines from working so as to take away the support from the surface, and the owner of the mines would be entitled to all the minerals which he could obtain by ordinary and proper working, without obstruction by the owner of the surface. The only principle which could be applied in the case last supposed is contained in the maxim *sic utere tuo ut alieram non lædas*."

From this it seems clear that the true principle is—there is in every case a grant actual or presumed. If you have got the deed, construe it according to the ordinary rules of construction; if you have not got it you must endeavor to infer its terms from customs and mode of user. If you can get nothing from them, then you resort to the general maxim referred to, not to any presumption peculiarly applicable to mine and surface-owners. In this last case, no doubt the maxim works exactly the same effect as the presumption would do.

As a general rule, however, the grant is in evidence, and in construing it something must depend upon whether it is a grant of the surface reserving the mines; or the reserve, on account of the rule of construction in favor of the grantee. As to the construction of a grant of the surface reserving the mines, one of the earliest and most important cases is that of Harris v. Ryding, 5 M. & W. 60, s. c. 8 Law J. Rep. (N. S.) Exch. 181, where the grantor reserved to himself "all" the mines, with liberty to enter on the surface to dig and work "the said mines" and "every part thereof," and to sink shafts, etc., making fair compensation "for the damage to be done to the surface." It was strongly argued for the mine-owner that the parties had agreed that all the minerals might be taken without anything being left to prop up the surface, the surface owner receiving a "fair compensation" in money if the surface were thereby damaged; but the Court of Exchequer unanimously agreed that, although all the minerals might possibly belong to the grantor, the power reserved to him to take them was subject to the limitation that he must leave sufficient to support the surface, and that the compensation clause did not enlarge the power.

The decision of the court certainly amounts to this:

1. That a reservation of and power to take all and every part of the mines, do not suffice to permit the grantor to take all, but only so much as he can without depriving the surface of its due amount of support.

2. That where the compensation clause, though in terms large enough to apply to damage done by undermining as well as by works on the surface, is not inconsistent with the supposition that damage by works on the surface alone is contemplated, it will not be read as enlarging the power of the grantor, but will, itself, be limited to acts done under the power.

Baron Parke, however, expressed an opinion not necessary for the decision of the case before him, going further than this. Looking only at the reservation, he said that that did not permit the grantor to let down the surface, and upon consideration of that alone he declared it to be the intention of the parties that the surface should be supported; and then went on to say that the grantor "would be acting in derogation of his grant if he were to take the whole of the coal below, he having granted the use of the surface to the grantee;" and further on, as to the compensation clause: "It seems to me, upon the true construction of the covenant that the provision applies only to the exercise of rights upon the surface; but supposing it otherwise, and it applied to any injury of this sort done by getting the minerals below in an improper manner not authorized by the power, all that can be said to it is that it only gives an action of covenant by the covenantee against the covenantor, as well as any other remedy he might have, for acting in that respect without being authorized by the power.

We desire to take exception to the manner in which the learned baron arrived at his conclusion as to the intention of the parties upon the consideration of only one portion of the deed. His lordship's judgment affords authority for the argument that the moment you have reached the end of the reservation clause you are justified in saying that you know all the extent and limitations of the grant, and that any attempt by a subsequent clause to put any further restriction or limitation upon it would be a "derogation" which could not be allowed. Now we submit that before you can define the extent or limitations of the grant, you must read to the very end of the deed, and consider the bearing of every clause upon the others. No clause in a deed "derogates" from the grant made by the deed; it helps to describe what the grant is.

After this came the case of Hilton v. Lord Granville, 13 Law J. Rep. (N. S.) Q. B. 193, s. c. 5 Q. B. 701, where Lord Denman, delivering the judgment of the Court of Queen's Bench, went so far as to say that a grantor could not reserve a right to destroy the thing granted. The decision in Smart v. Morton, 5 Ell. & B. 30, s. c. 26 Law J. Rep. (N. S.) Q. B. 260, is really on all fours with that in Harris v. Ryding, extending to, but not going further than the two points we have stated. In Rowbotham v. Wilson, 30 Law J. Rep (N. S.) Q. B. 49, s. c. 8 H. L. c. 348, the agreement between the parties provided that the mines might be worked without let or hindrance by the owners of the surface, and without

li bility to any action for damage by reason of the surface being less commodious to the occupier by sinking in hollows. The House of Lords (consisting of Baron Parke—then Lord Wensleydale—and Lords Chelmsford and Kingsdown) unanimously affirmed the judgment of the lower courts, holding that the grantee of the surface had bargained away his right to support, and in effect overruling the opinion of Lord Denman in Hilton v. Lord Granville. This case also decides that an agreement in the form of a covenant by the grantee authorizing the grator to let down the surface, will, if necesary, be read as a grant of the right to do acts destructive of the surface, and affects not only the parties to the deed but all their successors in title.

The case of The Caledonian Railway Company v. Sprot, 2 Macq 449, is one always cited in support of the surface-owner. By the deed in that case the lands were granted to the company excepting the mines, the grantor reserving also "liberty to search for, work, win, and carry away the same," etc. It was decided that the question turned entirely on the deed; that divers acts of Parliament which were referred to, did not alter the relations established by the deed; and as in the deed there was not a word to be found showing that the parties contemplated the surface being let down, there was nothing to rebut the already well-established presumption that the grantor must leave sufficient minerals to support it. The important part of the case is that, as the surface was granted for the purpose of being used in a particular way, the amount of support must be such as to enable the grantee to use it in that way.

In the Duke of Buccleuch v. Wakefield there were reserved to the mine owner powers for entering upon the surface and executing works there and working the mines; and after in great detail setting out these powers, the clause authorized him "to do all further and other acts and things whatever for getting the said mines, minerals, and quarries, and carrying on the works thereof," yet making reasonable compensation for damages done by such works as aforesaid to the person or persons sustaining the damage; and the House of Lords unanimously held that the mine owner might work so as to let down the surface, paying compensation.

The Lord Chancellor (Hatherley) appears to have argued, that as the mine owner might, under the large powers reserved to him, entirely destroy the surface by works done on the surface, there was no reason for presuming that he might not destroy it by undermining, as in any case full compensation was to be paid.

Lord Chelmsford considered that the detailed powers so fully covered everything that could be done on the surface, th it the general words enabling the mine owner "to do all other acts," etc., must refer to underground works damaging the surface.

Although the question in this case arose upon an Act of Parliament and not a deed, yet the position of the parties appears to be the same as if it were a deed granting the surface and reserving the mines in the terms of the act.

All their lordships gave considerable weight to the fact that there was a compensation cla se.

In the Scotch case of Buchanan v. Andrew, L. R. 2, sec. App. 286, land underneath which mines were being worked was leased for the purpose of building, excepting all the coals, etc., and such other matters as might be necessary for the working thereof, and that free of all or any damage which might be occasioned thereby to the lessee; and the lease contained another stipulation that the lessor should not be liable for any damage that might arise to the surface or the buildings that might be erected thereon from working and carrying away the minerals underneath. The lessee, who had bound himself to build on the land, contended that the lessor was not entitled to work the mines so as to destroy the house; that "the proper working of the coal" must be construed with reference to the primary object of the lease, viz., the building of the house. The House of Lords, however, decided to the contrary; Lord Chelmsford remarking, that the arguments for the lessee "assumed the impossibility of any person entering into a contract which it is taken for granted is a highly imprudent one, thereby resorting to conjecture instead of resting upon construction. For how can it properly be assumed that there is imprudence in the contract?" and again: "It is the safest and best mode of construction upon all occasions to give to words, free from ambiguity, their plain and ordinary meaning."

The latest case is that of Aspeden v. Seddon, 44 Law J. Rep. (N. S.) Chanc. 359, where land was granted in fee simple at an annual chief rent as a site for a mill which the lessee was to build and keep in good repair, the deed excepting and reserving to the grantor "all" mines, with liberty to "search for, get, win, take, cart, and carry away the same, and sell or convert to his own use the said excepted mines * * * * or any of them, or any part or parts thereof at pleasure, and to do all things necessary for effectuating all or any of the aforesaid purposes (but without entering upon the surface of the said premises, or any part thereof; so that compensation in money be made * * * for all damage that shall be done to the erections on the said plot by the exercise of any of the excepted liberties or in consequence thereof"). The Lords Justices, in affirming the judgment of the Master of the Rolls, said, that if the deed had stopped short of the passage which we have enclosed in the parenthesis, they would have been bound by the authorities to hold that the preceding powers would not be sufficient to take away the mill owner's right to support; but that with the addition of the words in our parenthesis, the plain meaning of the whole reservation was that the mine owner was to be at liberty to remove the whole or any part of the minerals at his pleasure. Works on the surface being expressly prohibited, the only damage that could accrue under the powers must be from undermining, and no such distinction could be drawn or was suggested between accidental and intentional damage. Damage for which compensation was agreed to be given would be damage done rightfully under the power.

Here the express words of the deed showed that the parties could not have had in view damage by works on the surface. In the case of Buchanan v. Andrew the mines were in course of working probably from adjoining pits; no powers expressly over the surface were reserved; so that in that case too, the only damage that could be expected must have been damage by undermining. Their lordships, however, seem to have decided the case rather on the generality of the terms used in the deed than on these peculiar circumst nces.

In all the cases it is admitted that the intention of the parties to the grant must govern the question. In the earlier ones the courts, in seeking for what they considered to be that intention, gave very great weight to the presumption in favor of the grantor, Hilton v. Lord Granville, even going so far as to say that the presumption would override express words. In the more modern cases, which are of higher authority, more attention is paid to the literal meaning of the words used in the document, while the weight given to the presumption appears by Buchanan v. Andrew to be reduced to a minimum. Harris v. Ryding, nevertheless, is still recognized as a binding authority on both points; although it seems to us doubtful whether, if it had to be decided for the first time at the present day by the House of Lords or the Lords Justices, the result would be the same. The result of the cases appears to us to be that if it can he clearly inferred, either from any words in the deed, or from the manner of working the mine, or any other circumstances existing *at the date of the deed*, that the parties contemplated damage occurring from underground operations in the regular course of mining, then the presumption in favor of the grantee will be rebutted, and the large expressions, "all the mines," "every part," etc., used in the reservation will not be cut down; nor will the mine owner be restrained from working so as to destroy the surface and buildings thereon, even although there be no compensation clause.

With regard to cases where the mines are granted reserving the surface, if the presumption which as we see operates in the other class, of cases to cut down general expressions contained in the reservation, be, as some hold, a general presumption in favor of the surface owner as such, it ought to have a similar operation in this class and control the words of the grant; if, on the other hand, it be a mere presumption arising from the rule of construction in favor of the grantee, it will now have no operation whatever. We have not space to discuss the cases which have arisen on grants of mines. No doubt, in many if not most of them, the presumption will be found treated as in favor of the surface owner as such. It is so in Smith v. Darby, 42 Law J. Rep. (N. S.) Q. B. 140; but Eaden v. Jeffcock, 42 Law J. Rep. (N. S.) Exch. 39, decided within a fortnight afterwards, seems to us to take a different view, and to hold that, at all events in the case of mining leases, there is no presumption to restrain the lessee from destroying the surface.—[*The Law Journal*

THE DEFENCE OF INSANITY.—At Maidstone and Croydon Assizes, three charges of murder were tried before Mr. Justice Brett, and in each case the jury acquitted the prisoner. One of the indictments was perferred against an unmarried woman for the murder of her newly born child; the other two were indictments against men for the murder of adults. George Blampied had killed a fellow-workman by striking him on the back of the head with an adze; Frederick Hunt had cut the throat of his wife, and also of his child. In the first case referred to the woman had thrown the baby out of the window almost immediately after its birth, and the jury adopted the theory that she was in a frenzy at the time, and laboring under puerperal derangement. George Blampied had been confined in a lunatic asylum from 1868 to 1872, but had been released as perfectly sane. Frederick Hunt had been in a low and desponding state of mind from loss of employment for some time before he killed his wife and child, and it was also proved that his brother was a lunatic, and that his sister had committed suicide. In his case the theory of individual insanity was supported by evidence of an hereditary taint.

At the trial of George Blampied, the learned judge took infinite pains to direct the minds of the jury to the true issue submitted to them. Again and again, in the most impressive manner, and in terms which could not be misunderstood, he urged them to consider that they were not trying the question whether the prisoner was insane or had delusions, but whether it was made out to their satisfaction that, at the time of the act, the prisoner did not know the nature of the act he was doing, or did not know that it was wrong. Did the prisoner kill the man? did he know he was killing him? did he know that it was wrong, or contrary to law, to kill him? In the same manner, at the trial of of Hunt, his lordship used every means that learning, experience, and force of language could furnish, to bring home to the jury what it was that they were bound by their oaths to decide. The result, however, in all three cases was the same—an acquittal on the ground of insanity.

It is easy to understand the verdict in the case of the mother charged with the murder of her illegitimate child. So long as juries in these cases have to elect between the penalty of death and an acquittal, they will certainly not be unwilling to adopt the theory of momentary frenzy or pureperal derangement. But such cases as those of Blampied and Hunt suggest that the wild speculations of medical experts have begun to leaven the whole community, and to influence the classes from which jurors are drawn. The inclination of the judge's opinion in Blampied's case, and perhaps in Hunt's also, was easy to be discerned; and yet the jury refused to follow the indication of a judge whose power over juries is as great as was that of the late Lord Chief Baron, and perhaps greater than that of any other judge now on the bench. But, much as the cause of justice may suffer, if error thus darkens the minds of jurors; and deplorable as such a result would be, it is, if possible, more painful to learn that the lunatic classes have profited by the teaching of their guardians. Yet we have proof of the most startling character to this effect. It appears that Blampied was under the care of Dr. W. P. Kirkman, of the Kent County Asylum for four years, that he was allowed to go out on probationary leave by Dr. Kirkman, and at length received a final discharge from Mr. Buchanan. Blampied seems to have been really cured of his delusions, which took the form of *la monomanie vaniteuse*. But what does Dr. Kirkman say as to Blampied's knowledge of the crime of murder, and appreciation of the theories of the extreme school of experts on that subject?

"Upon one occasion," says Dr. Kirkman, "when reproving Blampied for having assaulted a harmless fellow-patient for some trifling offence, he told me that he would strike him, and that if I attempted to prevent him he would murder me. I pointed out to him that the punishment for murder was death according to the English law, when he replied with much promptitude: "Oh! no, not for me; as I am a lunatic, I am not responsible for my actions, and if I do commit murder you can not punish me for it, because it is contrary to the law to punish an insane man." I told him that if he could argue in that manner, whether sane or insane, he was morally responsible to the Almighty for his actions, and that if he committed an offence of the kind he ought to be punished. His reply was: 'Yes, I know that; but you can not punish me, whatever I do.' Threats of this nature he was constantly holding out to attendants, patients, and others; and this kind of threat is common among the insane. After such a conversation as this, few would (unless their minds were perverted by the "uncontrollable impulse' mania) question the propriety of Blampied being held for his actions. On another occasion, when remonstrating with him for series of assaults upon harmless patients—for he never used to attack any patient who he knew could return the blow with interest—his behavior was most threatening to myself and every one around. I then told him that, knowing better, I should hold him responsible for his future behavior as regarded personal assaults, and that for every blow he must forfeit a week's allowance of tobacco. What was the result? How many weeks' allowance of tobacco did he forfeit? One only. At the close of the week (Friday being the day for issuing the tobacco) he placed in my hand a well-indited penitent letter, promising amendment, and giving me his 'word and honor' that he would not strike again. I took his word, removed him to a quieter ward, restored his tobacco the following week, and had no occasion again to withdraw it."

In contemplation of such facts as these, well may Dr. Kirkman make the foliowing reflections: "As regards the criminal responsibility of the insane, and the "uncontrollable impulses" to which they are subject, there is no doubt that there is much danger of alarming consequences resulting from the forcing of theories in place, and out of place. Many lunatics are capable of appreciating right from wrong, have a thorough and sound knowledge of the quality of sinful acts, and are morally and physically able to resist their implses to commit them. I could produce hundreds of instances to support my statement. The doctrine of 'uncontrolable impulses' has been ridden so hard that the public will soon begin to think that all the 'mad doctors' are 'hoist with their own petard,' and that not one can give evidence in a case of criminal magnitude without betraying his delusion."—[*The Law Journal.*

Correspondence.

REFLECTIONS IN JUDICIAL OPINIONS UPON THE JUDGES OF INFERIOR COURTS.

EDITORS CENTRAL LAW JOURNAL:—The Chicago Legal News sometime ago published an opinion recently delivered by the Supreme Court of Illinois, through Justice Breese, in the case of The Toledo, Wabash & Western Railway Co. v. Mary Durkin, which has created a good deal of surprise to all members of the bar prac-

ticing in the 22nd circuit, over which Judge Wm. H. Snyder presides, not on account of the decision itself, but on account of the severe criticism and reflection cast on the judge who tried the case below.

The question was as to the liability of the railway company, for injuries done by most culpable negligence by one servant, to a co servant. The court below, on the evidence presented, held the company liable. The supreme court, after reasserting the rule laid down by it of late in repeated instances, that the real principle of *respondeat superior* does not apply to cases wherein the negligent and the suffering parties were co-employees, *without giving the facts of the case*, goes on to charge the court below, with "having by its judgment totally ignored and held for naught the decisions of the supreme court; that the learned judge had either forgotten these cases or perceived something in the facts of this case, taking it out of the common rule established by them. But the supreme court failed to perceive anything which could or should take this case out of the operation of the rule which they had so frequently announced."

Now, with due regard to the supreme court, would it not have been far better, and far more conducive towards sustaining proper respect on the part of the public for courts of justice, if it had confined itself to say that they did not view the facts in the same light as the court below, and that they thought the rule applicable to the case? Why charge the judge even in the alternative with having forgotten, or deliberately set at naught the rule? Does not the supreme court know that the rule itself is confined to cases where the employees of the master *are in the same line of employment*, and that the question of whether they are in the same line or not, is often a very difficult one to solve? Are not the books, including the Illinois reports, full of cases where the courts have given different decisions upon facts almost precisely alike relating to this very question? Now is it necessary to reflect upon a judge if he should have come to a different conclusion on the facts? We think that all such reflections, except in most extraordinary cases, are not in good taste, and had always better be omitted.

Judge Snyder was on the bench for a number of years under the old constitution, and though young at the time, discharged the duties of his office uprightly and very creditably. He has been on the bench for two years past, and has given great satisfaction. *No one judge*, we believe, has adhered to the rule spoken of in the decision more sternly and more repeatedly than he has. He has set verdicts aside time and again, just for the reason that the masters were not liable for acts of their joint employees against one another, and shown an independence in just such cases such as we could wish that all courts were possessed of. There is but one opinion of the members of the bar in regard to this subject, and that is, that the censure cast upon him by the Supreme Court is wholly undeserved by Judge Snyder, and it is even stated by some who heard the trial below, or rather have read the facts as agreed upon, that Judge Snyder's views respecting the facts, might be approved by a great many very good lawyers.

To reflect in opinions on inferior courts, counsel or parties, they having no opportunity to defend themselves except in very clear cases, and then only when the opinion presents all the facts on the case, is always a matter of great delicacy, and, as a general rule, had much better be dispensed with, because many times deep injustice may be involuntarily inflicted, and no perceptible good can be thereby accomplished.

A MEMBER OF THE BAR OF THE 22d CIRCUIT OF ILLINOIS.

LIFE INSURANCE.

EDITORS CENTRAL LAW JOURNAL:—It is sad, but the wail of your "insurance" correspondent over the Ohde and Grigsby cases, which apply to contracts of life insurance, as to other contracts, certain well known principles of equitable relief, should not deter the courts from a little discipline of the consciences of insurance directors. Insurance companies delight in lapsed policies, for out of such misfortunes grow a large share of their profits. Hence they stoutly resist any obstruction they find in the way of the agreeable process of lapsing, on the ground that it interferes with the smooth running of the actuarial calculations. Yet everybody knows that the enormous cost of insurance is largely due to the *per cent.* which is provided by these same calculations for the contingencies which happen to throw them out of joint.

Does anybody suppose for a moment that the failure to pay the pitiful sum of $6.97 interest *in advance* on a $3,000 policy, the premiums on which had been paid, so far as payments were required, could seriously impair the resources provided for its payment. And if a mutual company of one hundred thousand persons should sustain on each member a similar loss, the proportion to the whole amount of insurance would be no greater, so that, if it be remembered that the apparent loss is deducted from the proceeds to be paid when the policy matures, it would seem no great hardship on the company to hold that no forfeiture should occur for the neglect. Besides, if a loss occurs immediately after the payment of interest *in advance*, the company gains that much, and it is likely that in a large company such gains would outweigh occasional losses of interest. But it is not these small losses of interest which concern the companies at all, as is well known, but the loss of the gains of money previously paid in as premiums, which they would retain in defiance of all sense of justice and right. Even courts of law should in such cases of neglect apply the maxim *de minimis non curat lex*.

Now the immense losses which accrue to policy-holders by lapsing, so out of proportion to any benefit received, operated to deter prudent men from insurance; and to counteract this, the companies, were compelled to provide an alluring scheme of *non-forfeiting* policies, which insurance solicitors and agents recommend with most inviting promises of absolute safety; so much so that i is altogether probable that ninety-nine out of a hundred victims believe that after they have made the required payments in money no forfeiture is possible, and in this belief pay their money. The disgust comes in when year in and year out they are called on to submit to have their dividends applied not to liquidate their interest, as in other contracts would be the case if credits were allowed, but to reduce their notes which they were told, under ordinary circumstances, were not to be paid at all, but deducted out of the proceeds after death. To the average mind there is no reason why interest should not follow principal and be deducted out of the proceeds where the dividends fail to pay it. Our information is that some companies, like the Etna, have abandoned all claim to forfeiture for the non-payment of interest on the premium notes o commuted policies, and carry out their promise that the policy shall be non-forfeiting. It is this promise that courts of equity enforce; they will not permit the companies by inconsistent conditions to defeat it; and no doubt they will always enforce the non forfeiting clause, even if they have to annul ensnaring clauses inserted to neutralize it. They so treat other contracts, and why not those for life insurance? The fact that life insurance is based on actuarial calculations deserves great weight, and receives quite as much as it is entitled to, in considering the contract, but it does not justify the "pound of flesh" principle which "Insurance" would apply.

It is the ancient struggle between iron-clad *legal* rights and beneficent *equitable* doctrine which goes on within every field of jurisprudence, but is particularly active wherever civilization presents a new arena for the conflict. The courts of equity are used to the fray, and are especially armed for it. No persons understand this better than insurance actuaries, and in the business slang of the street, it may be said, that the companies have long since "discounted" it, as all who pay the extravagant premiums know. It has now come to be well understood among men that all contracts are made with reference to the law which subjects their jagged edges to the polishing file of the Lord Chancellor. A few more rasps will some-

what rectify that marvelously rough contract known as a policy of life insurance. It will be all the more attractive for the process.

E. S. H.

MEMPHIS, TENN.

[As long as the file is used only in cutting out fraud and imposition, we say amen, and let those who do not like it gnaw the file; but when the artist who uses the file adds thereto anvil, hammer and tongs, and proceeds to make for the benefit of *one* of the parties a contract which *neither* of them originally intended, he gets beyond the recognized powers of courts or even of legislatures; he unwarrantably interferes with private rights.—Ed. C. L. J.]

Recent Reports.

REPORTS OF CASES AT LAW AND IN CHANCERY ARGUED AND DETERMINED IN THE SUPREME COURT OF ILLINOIS. By NORMAN L. FREEMAN, Reporter. Volume 66. Printed for the Reporter. Springfield: 1875. Journal Company.

This is a very neatly bound volume of something over 650 pages, about 100 of which are occupied by the index, and 10 by the table of cases. There is also a small table of "unreported cases," omitted from the reports "by direction of the court." The names of the parties, of the circuit court, of the counsel, and of the judge who delivered the opinion, are given in the latter table; also the final disposition of the cause, but no intimation of the points decided. The substitution of the latter for some one or more of the first named items would doubtless be accepted as an improvement by the profession. In remarking upon the index to the volume before us, it may not be improper to examine briefly the manner in which such indexes are made; and which has prevailed, both among English and American reporters for many years. The plan seems to have been to take the proof-sheets containing the syllabi, and, after prefixing "catch-words" in large type to indicate their proper position in the index, to insert them bodily, sometimes with cross-references, under an arrangement more or less convenient for reference, into a sort of *digest* of the matters contained in the syllabi.

Conscious of the authority which exists, from long usage, for this mode of constructing indexes to reports, we respectfully submit whether it does not really possess very serious disadvantages.

The embodiment of the entire matter of the syllabi in the index, necessarily results in the occupation of space equal to that which the same matter has already occupied in the body of the report. This, when the syllabi are not thoroughly condensed and intelligible, detracts from the value of the index *as a digest*, because a digest should properly be a *brief* statement of the matters contained in the text It is, according to Webster "that which is worked over, classified and arranged; a compendium; a summary; an abridgment;" while, according to the same authority, an index is "that which points out; a *table for facilitating reference to* topics," etc. So that what have come to be called indexes, are really neither indexes nor digests. Why the index of a report should have come to be looked upon as of less importance, requiring less care and skill in its manufacture than that of a text book is a problem we find ourselves unable to answer and we appeal to the reporters for a satisfactory solution It is true, that while there are many who can write good law-books, or compile excellent volumes of reports, there are very few who have the peculiar faculty of making a good syllabus or index; and from the prolixity and redundancy of the syllabi in many of our modern reports arises the chief difficulty in making a good index by the "scissors and paste" plan.

The volume before us is not an unfit illustration of the suggestion we have made. The syllabi are in many respects imperfect, lacking the terseness and perspecuity which should properly belong to them. In one case, that of the C. B. & Q. R. R. Co. v. Notzki, p. 455, the matter contained in the syllabus, in brevier type, occupies thirty-nine lines, or about one full page, while the matter contained in the report of the case occupies less than two and a half pages, small pica type. Upon turning to the index we find the three paragraphs of the syllabus incorporated into it, under a single general head, "Negligence." The only changes which are made are as follows: In the first paragraph of the syllabus proper, the head-line reads "Negligence. failure to ring bell or sound whistle." This in the index becomes the second paragraph under the heading "Negligence in Railroads." The head-line of the second paragraph of the syllabus which reads, "Same, instruction as to negligence of plaintiff," becomes in the index the first paragraph under the head of "Comparative and contributory negligence," while the third paragraph of the syllabus, whose head-line is "Same, evidence admissible to show plaintiff's want of care," becomes in the index the second paragraph under the head of "comparative and contributory negligence." Briefly stated, these three paragraphs, thus thrice printed in the volume, embrace the following decided points:

1. An instruction that if the plaintiff, who sues for a personal injury, was injured by defendant's engine at a city street crossing, no bell having been rung or whistle sounded, the jury should find for plaintiff, unless he was guilty of contributory negligence, was held erroneous, being upon a question of fact which should have been left to the jury.

2. That an instruction, asked for defendant, was properly refused which charged that if the jury believed in such case, from the evidence, that when plaintiff was approaching the crossing, there was a switchman in full view, signaling an approaching train, and that plaintiff saw him so doing, then these facts should be considered by the jury in determining the question of the plaintiff's negligence, such instruction not having submitted the question whether such signal was one which would have indicated to a man of ordinary intelligence warning of an approaching train.

3. That evidence of the manner in which several railroad tracks near the place where the injury occurred were used, and of the plaintiff's knowledge of such manner should have been admitted by the court, the declaration having charged that the company's cars standing on such tracks, obstructed the view from the crossing.

Instead, therefore of elaborating the syllabus until it becomes unfit to be used in the construction of the index, it seems that it is only after the utmost condensation consistent with intelligibility, and coupled with the most strictly appropriate selection of catch-words for the head-line of each paragraph, that the syllabus is fit for such use; and even then, as will presently appear from the same case we have been considering, the reporter can not be sure that he has not misled his readers. Upon examination of the facts and opinion in the case named above, a very important fact appears which is not mentioned in the syllabus at all, and, which although familiar to Illinois lawyers, should have been mentioned for the guidance of others, viz., that a statute of the state requires the ringing of the engine bell, or sounding of the whistle at crossings as a precautionary duty, the neglect of which will make the railroad company liable for injuries caused thereby. And in the case of Flower v Elwood, p. 438, the syllabus containing thirteen paragraphs brevier type, occupies three full pages, while the entire report of the case occupies eight and a half pages only, of small pica type, leaded Of course each paragraph of the entire syllabus is again reprinted in the index, under some one of the numerous heads, which often fail in any respect to correspond with the head-lines of the syllabus We might multiply illustrations, but the above would seem sufficient to indicate that there may be broad grounds for urging a reform in the manner of compiling the indexes to volumes of reports, and some foundation for the sugge tion that the mode prevailing among writers of treatises and text-books would be most preferable and satisfactory.

A large number of the decisions contained in the volume before us have already been noticed by us (*ante*, pp. 403, 436, 450, 467, 483), and from those remaining we select the following:

Mechanic's Lien—Alterations and Improvements.—Bryan v. Whitford, p. 33. Under the provisions of the statute (R. S. 1845), giving a lien in favor of the original contractor for labor or materials used in *erecting* or *repairing*, and the subsequent act (1869) extending the lien in favor of subcontractors to cases of *altering*, beautifying, etc., no lien was created in favor of the original contractor, for altering, beautifying or ornamenting a building already erected.

Constitutional Law—Law Regulating Speed of Railway Train.—The C. R. I. & P. R. R. Co. v. Reidy, p. 43. The act of 1865, making railroad companies liable for all damage done to any individual, and for stock killed by any train or engine in any incorporated city or town, where their trains are permitted to be run at a speed greater than that fixed by the statute, is not unconstitutional.

Carrier—Warehouseman—Goods Arriving at Destination on Sunday.—The Anchor Line v. Knowles, p. 150. Where goods arrived at their destination on Sunday, and were placed by the carrier in a warehouse, and destroyed by fire before notice of their arrival could be given on the following day, the carrier incurred no liability for the loss by reason of having failed to give notice of their arrival to the consignee.

Carrier—Passenger carried beyond Destination.—C. R. I. & P. R R. Co. v. Fisher, p. 152 "Where a freight train was *in the habit*" of carrying passengers to a certain station, and before any different rule was made, the plaintiff bought a ticket for such station, but was informed by the conductor that he would not stop there, and was advised by the conductor to take another extra train, to which he applied and was refused passage. He returned to the freight train, informed the conducter of the facts, and taking passage, was carried beyond his destination. *Held*, that he was entitled to compensatory damages.

Eminent Domain—Property of Railroad Company.—P. P. & J. R. R. Co. v. P. & S. R. R. Co., p. 174. The lands of railroad corporations not actualy in use by them, or not absolutely necessary for the enjoyment of their franchises, are subject to be taken under the exercise of the right of eminent domain.

Executory Contract—Delivery on Sunday.—Scott v. Miller, p. 273. By a written contract of sale, plaintiff was to deliver hogs at a certain railroad station after December 1st, and before January 1st. No demand was made by the buyer. The 1st of January fell on Sunday. On the Friday previous the parties met. Defendant said he did not want the hogs Sunday, but would take them next Monday. It was finally agreed that they should meet again next day, and arrange for keeping the hogs a week longer. The plaintiff was there, but did not meet defendant. He therefore delivered the hogs at the station at eleven o'clock P. M. of Monday, the second of January, but the defendant had gone home, after waiting until dark. Next day defendant was notified of the delivery, but refused to accept the hogs. *Held*, that the plaintiff was entitled to recover for the value of the hogs, at the price stipulated.

Civil War—Jurisdiction of Courts affecting Property of non-resident Enemies.—Seymour v. Bailey, p. 288. Suit against vendors of lands in Cook county, Illinois, by the assignees in bankruptcy of the vendee, a resident of Alabama, who had given mortgages to secure deferred payments of the purchase-money, to redeem from sales made under decrees of foreclosure of the mortgages. The existence of the war did not suspend the operation of statutes authorizing the prosecution of suits against non-resident defendants, domiciled in the rebellious states in respect to their property situated in Illinois, so as to deprive the Illinois courts of jurisdiction to enfore upon such property the collection of debts. The disability of an alien enemy is simply an incapacity to *sue*, and does not extend to the prevention of others from *suing him*. See De Jarnette v. De Giverville, 1 CENT. L. J. 226; Washington Un'y v. Finch, Ib. 66.

Surety—Released by Surrender of Collateral.—First Nat. Bank of Monmouth v. Whitman, p. 331. At the time of the execution of a note to a bank, the principal deposited with the bank certain collateral for the protection of the surety in the note. The surety afterwards left the country, giving a power of attorney to his brother to transact any and all of his business. After maturity of the note the principal, with the consent of the attorney of his surety, negotiated with the bank the discount of one of the notes held as collateral, only a small portion of the proceeds being applied to the payment of the original note, and the balance used in the payment of another note of $150 due by the principal to the bank. *Held*, in a suit against principal and surety on the note, that an instruction that if the jury found from the evidence that the collateral was surrendered under the arrangement between the agent, the principal and the bank, and by reasons of representations made to the agent, that the bank held the collateral to cover *all* the indebtedness of the principal, they should find for the defendant surety, was erroneous in not leaving it to the jury to find whether the agent did or did not assent to the payment of the $150 note. The jury should have been left to find whether the collateral note was wrongfully perverted, without the consent of the agent.

Payment by Check or Note.—Heartt v. Rhodes, p. 351. In general, a payment by note is treated—*prima facie* as a conditional payment only, that is, payment only if the note is duly paid. The rule applies with greater force in case of taking a check.

Payment—Surrender of Notes—Mortgage.—Flower v. Elwood p. 438. The surrender of prommissory notes by the holder to the maker is *prima facie* evidence of their payment, but such presumption may be rebutted by other proof. Where a mortgage on distillery property provided for a release to the United States of a priority of lien, in a certain event, and new notes were given to represent the notes secured by the mortgage, and a release executed in accordance with the provisions of the mortgage, and the mortgage was thereupon surrendered to one of the makers of the notes, it was *held*, that as against a purchaser under a junior incumbrance, there was no discharge of the lien of the first mortgage. C. A. C.

Summary of Our Legal Exchanges.

UNREPORTED DECISIONS.

Criminal Procedure—Motion in arrest of Judgment—No. 5137. Mullen v. the state, Supreme Court of Indiana, Pettit, C. J. The indictment in this case was in two counts. The first was for robbery, and the second was for grand larceny. Plea of not guilty. Trial by jury and verdict of guilty.

The errors assigned, one, the overruling the motions for a new trial, and in arrest of judgment. An arrest of judgment in a criminal case can only be had for two causes: "1. That the grand jury who found the indictment had no legal authority to enquire into the offence charged, by reason of it not being within the jurisdiction of the court. 2. That the facts stated do not constitute a public offence." Neither of these causes, in fact or in law exist in this case, 46 Ind. 305. The motion for a new trial was for the reasons that the verdict was contrary to the evidence, and the verdict was contrary to law. The evidence itself shows that defendant was guilty of robbery as charged in the first warrant; nor is the verdict contrary to law, but in full accord with it. Affirmed. —[*Indianapolis Sentinel.*

Practice in Appellate Proceedings—Filing Bill of Exceptions. Board of Commissioners of Kosciusko County v. Epperson. Supreme Court of Indiana, No. 3866, opinion by Downey, J. Action by and judgment in favor of appellee against appellant. The judgment was rendered in August, 1872, and counsel for defendant were given until the 1st day of January, 1873, to prepare their bill of exceptions. The bill of exceptions was prepared and signed by the judge within the time, but, according to the clerk's indorsement, was filed in his office on the 15th day of March, 1873. Motion is made to strike the bill of exceptions out of the record, and it must be sustained. When time is given within which to "prepare" a bill of exceptions, or, in the language of the statute, "to reduce the exceptions to writing," it must be intended that the bill of exceptions must be prepared, signed by the judge, and filed with the clerk, so as to become a part of the record within the time given. The bill should be prepared in time to give the judge opportunity to examine it and the party time to file it within the specified time. The case in 29 Ind., 398, has been practically overruled in several later cases. There is no question in the case which does not depend upon the bill of exceptions.—[*Indianapolis Sentinel.*

ADVANCE SHEETS OF 67 ILLINOIS REPORTS.*

Taxation—Application of Collector for Judgment—Procedure—Evidence—Appeal—Costs.—Deerham v. The People. [67 Ill. 414]

1. Under the statute, the collector's report of the list of delinquent lands on an application for judgment, makes a *prima facie* case, and judgmen should be rendered upon it, unless good cause be shown why it should not. If there are any valid objections, it is for the land owner to point them out and make them appear. On such application, it will be presumed that the assessor and other officers connected with the revenue did their duty, in the absence of a showing to the contrary. 2. It was objected to an application for judgment against land for taxes, that the collector should have made the taxes by distraining and selling personal property. It appeared that he did levy on personalty, but that the objector replevied the same out of his hands: *Held*, that such party could not be heard to object to that not being done which he wrongfully prevented. 3. A notice of an application for judgment against delinquent lands, which described the lands as those "upon which taxes remain due and unpaid for the year 1871 *and previous years*," is a substantial compliance with the statute requiring such notice to state the years for which the taxes are due, especially where it does not appear that the land was charged with the tax of any *previous* year. 4. Where the newspapers are introduced in evidence containing notice of application for judgment against delinquent lands, this will afford evidence of the publication of the notice, if accompanied with other proof that the paper was a newspaper published in the county. 5. Where the judgment of the county court, against lands for taxes, is in proper form, and it is affirmed by the circuit court on appeal, a general judgment of affirmance will be sufficient without specifying the taxes due on each tract. 6. On appeal from the judgment of the county court against lands for taxes, where the same is affirmed, it is proper to render a personal judgment against the appellant for the costs. The statute does not authorize the collection of costs of the appeal out of the land against which the tax is assessed.

Devises—Survivorship—Construction—Sale of Contingent Interest in Legacies—Parties in Chancery—Acknowledgement of Deed.—Ridgeway et al v. Underwood et. al. [67 Ill. 419] 1. The rule which considers a gift to survivors simply as applying to objects living at the death of the testator, is confined to those cases in which there is no other period to which such survivorship can be referred. Where such gift is preceded by a life, or other prior interest, it takes effect in favor of those who survive the period of distribution, and those only. 2. Where a testator gave his wife an interest in his land during her life, in lieu of dower, for her support, and then provided that, at the death of his wife, and on his youngest child coming of age, the same should be sold and the proceeds divided among his seven youngest children, their heirs and assigns forever, and that, "if one or more of such children should die before inheriting his, her or their inheritance, to be equally devided amongst the remainder of the seven:" *Held*, that the right of survivorship would be referred to the period of distribution, which was after the death of the widow and the majority of the youngest child, and not to the time of the testator's death. 3 In such a devise, the words "inheriting" and "inheritance" refer to the same thing—the distributive share of the proceeds arising

*Courtesy of Hon. Norman L. Freeman, Springfield, Ill., Reporter.

from the sale of the land. Those words could not refer to title by descent, as the children could not take their share until long after the death of the testator, and even then the legal title did not descend to the seven youngest, but to all his children, there being others, and, besides, the legal title was not to be divided, but the money to arise from its sale. 4. Contingent interests are not, ordinarily, assignable at law, and yet they may sometimes be assigned at law if coupled with some present interest. So, at law, such rights and interests may pass by way of estoppel, by lease and release, or, under the English system, by fine. But in equity, contingent interests and expectancies may be assigned and may be the subject of a contract, such as a contract of sale, and, when made for a valuable consideration, will be enforced in a court of equity after the event has happened. 5. In such case, until the event has happened, the party contracting to buy has nothing but the contingency, which is a very different thing from the right to immediately recover and enjoy the property. He has not, strictly speaking, a *jus ad rem* any more than a *jus in re*. It is not a mere interest in the property, but a mere right under the contract. So, what purports to be an actual assignment in equity, amounts not to an assignment of a present interest, but only to a contract to assign when the interest becomes vested. 6. Therefore, a contingent legacy which is to vest on some future event, such as the legatee's coming of age or surviving the period of distribution, may, in equity, become the subject of an assignment or a sale. So, even the naked possibility or expectancy of an heir to his ancestor's estate, may become the subject of a contract of sale or settlement; and in such cases, if made *bona fide*, for a valuable consideration, it will be enforced in equity upon the happening of the event, or death of the ancestor, not as a trust attaching to the estate, but as a right of contract. 7. A testator, after giving his wife a life interest in his home farm for her support, by his will, provided that, at the death of his wife, and upon his youngest child coming of age, the same should be sold and the proceeds divided amongst his seven youngest children, and if any of them should die before the period of distribution, the portion of such should be equally divided among the survivors. Under the supposition that the interest had already vested in the seven children, one of them, by deed, conveyed his interest to the complainant for a valuable consideration, describing it as all right, title interest, claim and demand, whether in possession or expectancy, of the grantor's part, "being one of seven heirs:" *Held*, that the grantor had a contingent interest, depending upon his surviving the period of distribution, which was assignable in equity; but that, in order to give the deed effect, it must be treated as a mere equitable assignment, and, consequently, as not passing any greater interest than the assignor had at the time of the execution of the deed. It did not pass any interest subsequently acquired by the right of survivorship but only the one-seventh part of the proceeds of the farm. 8. Where land is, by will, directed to be sold, and the proceeds divided among certain devisees, they have the right to elect to take the land itself; and it seems that, if they all unite in a conveyance of the land to a third party, this will be an exercise of their right to treat the interest devised as realty. But such a conversion of the property from personalty to realty or the contrary, can not be made by a part only of the beneficiaries. Therefore, if the conveyance of either of them is insufficient to pass real estate, the deeds of the others will not have such an effect. 9. Where a will required land to be sold on the happening of a certain event, and the proceeds to be divided among the survivors of the testator's seven youngest children, and the complainants purchased the interest of all the children before the period of distribution, and where, subsequent to such purchase, and before the time fixed for distribution, two of the children died, it was *held*, on bill by the purchaser to have the land sold and the proceeds paid over to him, that each of the surviving children, and their husbands, where they were married women, were necessary parties, being interested in both the equitable and legal title. 10. Where the certificate of the acknowledgement of a deed, made by husband and wife, of an interest of the latter in real estate, fails to show that she was "personally" known to the officer taking the same, it will be wholly insufficient to pass her estate.

Railway Negligence—Collision between Train and Wagon—Docurine of Comparative Negligence.—Ill. Cent. R. R. Co. v. Maffit. [67 Ill. 431.] 1. The rule adopted by this court in respect to comparative negligence is, that the plaintiff, although guilty of some negligence, may nevertheless recover if the defendant is guilty of such a degree of negligence as, when compared, that of the plaintiff is slight, and that of the defendant is great. 2. In a suit against a railway company to recover for injury sustained by a collision with its train, on the ground of negligence is not giving the statutory signals before reaching a public crossing, an instruction leaving the jury at liberty to find for the plaintiff, even if they found he was guilty of *great* negligence, provided the defendant was only guilty of more negligence, does not state the law of comparative negligence correctly. 3. In such action, the court instructed the jury that, if they "believed, from the evidence, that the persons in charge of the engine in question saw the top of the plaintiff's wagon as it approached the crossing, and continued to see the same until the wagon reached such crossing, and that persons approaching such crossing from the east could not see a train until they were within about thirty feet of such crossing, then it was the duty of such persons in charge of said train to have slackened the speed of said engine, and to have warned the plaintiff of its approach by sounding its whistle or ringing a bell, and a failure to do so would be negligence on the part of the defendant." *Held*, that the instruction was calculated to confuse, and ought not to have been given.

AMERICAN LAW REGISTER FOR SEPTEMBER.*

An Abstract of Title.—This number of the Register contains a long article under this head by James P. Root of Chicago.

New Trial—Misconduct of Jurors.—Tomlinson v. Town of Derby, Supreme Court of Errors of Connecticut, opinion by Park, Ch. J., and note by Judge Redfield. [14 Am. Law Reg. (N S.) 543.] 1. A motion to set aside a verdict for the misconduct of a juror, and a motion for a new trial for errors in the rulings of the court, can be filed in the superior court at the same time, and can be reserved together for the advice of this court. 2. Where a juror has conversed with a person not of the panel, respecting the case on trial, it is sufficient cause for setting aside the verdict, unless it appears that the successful party in the suit has not been benefited or the defeated party injured, by the fact of the conversation. 3. Where a juror allowed such a conversation, in which it was stated to him that if the plaintiff should recover five thousand dollars damages he would have nothing left after paying his expenses, in which the juror expressed his concurrence, it was held, after a verdict for the plaintiff, that the effect of the conversation was presumably to increase the damages allowed, and that the verdict ought to be set aside.

Injury through Defective Highway—Sunday Travelling.—Johnson v. Town of Warburgh, Supreme Court of Vermont, opinion by Ross, J., and note by L. C. R., whoever he may be. [14 Am Law Reg. (N. S.) 547.] One travelling on Sunday without excuse, can not maintain an action against a town for any damage he may suffer through defects in its highways.

Railway Negligence—Fires from Locomotives—Duty of Company to keep its Track clear of Combustible Materials.—Salmon v. Delaware, Lackawana & Western Railroad Co., Supreme Court of New Jersey, opinion by Beasley, Ch. J. [14 Am. Law Reg. (N. S.) 554] 1. A railroad company is bound to keep its track and contiguous land clear of materials likely to be ignited from sparks issuing from its locomotive properly constructed and driven. 2. A person owning land contiguous to a railway, is not obliged to keep the leaves, falling from his trees, from being carried by the wind to such railway, nor to keep his lands clear of leaves and combustible matter; nor on failure to perform such acts, does he become contributory to the production of a fire originating in the carelessness on its own land, of the railroad company,

Specific Performance of Contracts interfering with Public Rights.—Marsh v. Fairbury, Pontiac & Northwestern Railway Co., Supreme Court of Illinois, opinion by Sheldon, J. [14 Am. Law Reg (N. S.) 561.] 1. The specific performance of a contract is a matter not of absolute right in the party, but of sound descretion in the court. 2. Railroad companies are incorporated not for the promotion of mere private ends but in view of the public good they may subserve; hence, contracts with them which can not be specifically enforced without interfering with the rights of the public, will not in equity be enforced.

Sale of Good-Will—Restraint of Trade—Bell v. Chase *et al.*, Supreme Court of Michigan, opinion by Campbell J. [14 Am. Law Reg. (N S.) 563.) A contract by the vendor of good-will, etc, not to engage in a special business within the state, so long as the vendee should continue in the said business, is not void as in restraint of trade, and may be enforced by a court of equity.

CHICAGO LEGAL NEWS, SEPT. 25.

Maritime Liens—Innocent Purchasers.—U. S. Dist. Court, E. D. of Mich., May 31, 1875. The Hercules. In Admiralty. Opinion by Brown, J. 1. Creditors of vessels plying upon the lakes must enforce their liens as against *bona fide* purchasers without notice during the current season of navigation, or within such reasonable time after the commencement of the next season, as may be necessary to arrest the vessel. 2. Circumstances may occur which would greatly abridge or lengthen this time. 3. The fact that the former owner of the vessel told the buyer, when purchasing her, that there might be some small claims against the vessel which he would pay; that he did not know what the claims were or who held them, would not affect the purchaser with knowledge of any particular claim. 4. The fact that the purchaser takes a mortgage upon another vessel indemnifying him against any claims upon the

* Phila.: D. B. Canfield & Co.

vessel purchased, does not operate to extend the time within which creditors should pursue their claims, or deprive him of his rights as a *bona fide* purchaser without notice. 5. Nor can mere notice of the existence of a certain claim affect his rights, unless such notice be had at the time of purchase or of payment. 6. Where a claim accrued in August, 1873, and the libel was not filed until September, 1874, and the vessel in the meantime was easy of access, and several times in the port where the supplies were furnished, *held*, that as against a person who bought and paid for her in January without notice of the claim, that the lien must be deemed waived.

Debts not Provable against a Bankrupt's Estate.—United States Circuit Court, Western District of Pennsylvania. Black v. McClelland. Opinion by McKennan, C. J. The plaintiff in this case was adjudicated a bankrupt on his own petition. Before the filing of the petition an action in trespass against him for an assault and batterv, brought by the respondent in this proceeding, in the state court, had beed tried, and a verdict rendered in favor of the plaintiff, but a motion for a new trial was made by the defendant, and judgment was not entered upon the verdict until after the adjudication in bankruptcy. *Held*, that the respondent's debt was not, therefore, in the category of debts provable against the bankrupt's estate at the time of the adjudication. The question on which the result of this proceeding turned, was, whether the amount of the verdict was a provable debt against the estate of the bankrupt. The English decisions are in direct conflict on this subject. But in *ex parte* Hill, 11 Ves. 646, where the question arose incidentally; and in *ex parte* Charles, 16 Ves. 256, Lord Eldon decided that a verdict in an action for damages for a *tort* was not a provable debt in bankruptcy, and this view was sustained by the judges of the King's Bench in *ex parte* Charles, 14 East, 197. The American act is even more restrictive as to debts which can not be proved against a bankrupt.

UNREPORTED DECISIONS—NEW YORK WEEKLY DIGEST.*

Copy-right at Common Law—Lost by Unrestricted Sale of Right to make Copy.—Rees *et al* v. Peltzer *et al.* Supreme Court of Illinois, June 16, 1875. Opinion by McAllister, J. W. P. Davie, an engraver, in 1860, at the suggestion of S. H. Kerfoot, a real estate broker in Chicago, compiled, from the public records, maps of Chicago showing the sub divisions, streets, alleys, etc., of the town. Davie sold these maps to several real estate dealers, amongst whom were Rees & Slocum, whom the appellents succeeded, and Ogden & Sheldon. No copyright was taken out by Davie or Kerfoot.

In the great fire of 1871 all the maps sold by Davie, except those belonging to the appellants and Ogden & Sheldon, were destroyed, and these firms sought to make a monopoly upon these two sets of maps and their uses. They formed a copartnership to control this use, and to participate in the profits. In the maps published there were added new streets, etc.

The Board of Public Works of the city having daily necessity for the use of these maps, it applied to the owners of these firms to obtain a copy of them. The price demanded was $5,000. The board had no legal authority to make such a contract, and it undertook to lay the matter before the Common Council, and nothing more. In this condition of the matter Ogden & Sheldon permitted the work of the copying of the maps to be commenced. The Board addressed a communication to the mayor and aldermen of Chicago in common council assembled, stating the necessity there was for the use of the maps, and giving an opinion that the price "was as reasonable as could be expected under the circumstances." This was the only mode under its charter to bind the city of Chicago. Ogden was a member of the council, and also of the finance committee, through which the matter was to be brought before the council for action. On the report of the board the finance Committee first acted, and Ogden insisted that the $5,000 should be paid, on the ground that the owners of the maps would thereby lose their monopoly. He asked for no restrictions, and there were none in the report of the board. The finance committee reported in favor of making the contract, and the council passed an ordinance to that effect.

The appellants filed a bill to restrain the respondents from publishing an atlas containing these maps, which were taken from the copies made by the Board of Public Works, for which the $5,000 was paid, on the ground that it was an invasion of a copyright therein attaching to appelants' ownership of such an atlas.

The bill was dismissed and this appeal was taken.

Held, 1. There is no right here under the acts of Congress relating to copyright. 2. Whatever right there is springs from the common law. That gives an exclusive right of property in maps, charts, writings and books, and mechanical inventions, as long as they are kept within the possession of the author. 3. There is no copyright in a *published* work at common law; such copyright exists by statute only. 4. Davie made a voluntary publication of his maps, and whatever right he had, as the author of them, were lost to him, and the maps became common property. 5. The owner of a copy of Davie's maps could confer a right on any one to make copies of them, and no injunction could restrain him. 6. The addition of streets, etc., in appellant's copy is not new, it did not change the plan; there was no authorship, and consequently no author's right. 7. But whatever rights appellants acquired by the accession of the new matter was lost to them by the sale to the city of Chicago, of the privilege to make a copy for public use, without restriction; that contract made the maps common property of the community. 8. For the acts of Ogden & Sheldon, were the acts of the appellants by reason of the partnership between them. 9. Ogden's participation as a public officer of the city of Chicago, in making the sale without restriction, estopped the appellants from setting up any allegation of restriction. 10. Equity will not grant relief upon alleged rights arising out of such a transaction as this with the city of Chicago, for it is, constructively at least, fraudulent, by reason of Ogden's interest in the contract; and the appellants were jointly interested with him. 11. Any person may make copies of the whole or any part of these maps, with the permission of the city authorities. 12. And the bill was properly dismissed on the ground that Ogdon and Sheldon were necessary parties thereto.

Mines—Leases.—Ganter *et al.* v. Atkinson *et al.* 35 Wisc. pp. 48-53 Here the sole right to mine for lead ore was given by a verbal contract, the consideration to be one-eighth of the ore taken out. The court *held* that the essees had an interest in the lead and minerals sufficient to enable them to maintain trespass against persons mining and taking away ore.

ALBANY LAW JOURNAL, OCTOBER, 2.

Trade Mark of One's Own Name.—Meneely *et al.* v. Meneely *et al.* New York Court of Appeals, September 21, 1875. Opinion by Rapallo, J. *Held*, that a man has a right to use his own name in his own business, even though he may thereby interfere with and injure the business of another bearing the same name, providing he does not resort to artifice, and do acts calculated to mislead. A person can not make a trade mark of his own name, and thus debar all other persons having the same name from using it in their business.

WEEKLY NOTES OF CASES.*

Estoppel of Creditor by Acquiescence in Assignment of Debtor.—Guiterman *et al.* v. Landis *et al.*, Supreme Court of Pennsylvania. In October, 1871, M. made an assignment of all his property to trustees for the benefit of creditors, in pursuance of a previous agreement. Under this agreement and assignment the trustees took possession of M.'s furnace and manufactured iron. Subsequeutly some railroad cars came into their possession under the foregoing assignment, and were levied upon as belonging to M. by the plaintiffs who had obtained judgment against him in 1873. There was a conflict of evidence as to the amount of encouragement of, and acquiescence by the plaintiffs (who had not signed the agreement of the creditors) in the assignment. The court below left it to the jury to say whether the defendants were misled by the plaintiff's acts, instructing them that positive evidende to that effect was not necessary if the fact could be inferred, and that the plaintiffs might give their acquiescence to the assignment by participating in meetings, making no objections, etc. Evidence was admitted of declarations, made by the plaintiffs to third parties, expressing satisfaction with the trust, without its being positively shown that they were communicated by the direction of the plaintiffs to the defendants, or that they influenced their action. *Held* (affirming the judgment of the court below), that in this there was no error. The following authorities were cited: Plaintiffs were concluded by their silent acquiescence. Karr v. Wallace, 7 Watts. 400; 1 Story Eq. Jur. secs, 384. 394; Kerr on Fraud and Mistake, 298 9; Robinson v. Justice, 2 Penn. Rep., 22. And by their acts of encouragement: Burke's Est., 1 Par. 473; Gray v. Bell, 4 Watts 413; Adlum v. Yard. 1 Rawle, 171; Pearsoll v. Chapin, 8 Wright, 15; Ingram v. Hartz, 12 Ill., 381; Share v. Anderson, 7 S. & R. 63; Meason v. Kane. 17 P. F Smith, 133; Com'th v. Green, 4 Wharton, 604; Lippencott v. Baker, 2 Benney, 185. As to what is necessary to constitute an estoppel *in pais*.—Com'th v. Moltz, 10 Barr, 531; Sergeant's Exrs. v. Ewing, 6 Casey, 81; Hill v. Eppley, 7 Ill. 334; Brubaker v. Okeson, 12 Ill. 522; Miranville v. Silverthorn, 12 Wright, 149; Millinger v. Sorg., 5 P. F. Smith, 225; Chapman v. Chapman, 9 Ill. 218; Reel v Elder, 12 Ill, 317; Pickard v. Sears, 6 Ad & El. 469; Kreiser's Appeal, 19 P F. Smith, 200; Ream v. Harnish 9 Wright, 376; Langdon v. Doud, 10 Allen, 433; Keating v. Orne, Leg. Int., May 7th, 1875; Bigelow on Estoppel, 481-3.

*New York: McDivitt, Campbell & Co.

*Kay & Brother, Philadelphia.

Book Notice.

THE COLLECTION COMPENDIUM. Compiled for the use of Lawyers and Business Men Generally. Containing a New and Original System for the Collections of Claims on all Points in the United States, Canada, etc., upon stipulated rates of per centage, without the aid or instruction of a third party; a digest of the laws of every state pertaining to collections, together with the court calendar, and instructions for proving and forwarding claims for collection; a digest of bankrupt, patent, trade mark and copyright laws, together with the banking laws of the United States, and a reliable list of banks and bankers for the year ending September 1st. 1876. E. A. SMITH, author and compiler, 516 Pine St., Saint Louis, and 316 Broadway, New York. Price six dollars. St. Louis: Riverside Printing House, 302 North Main St. 1875. 8vo. pp. 599.

The title of this book pretty nearly indicates its character, except the statement that it is for the year ending September 1st, 1876. This must not be understood hereafter as meaning that the information it contains is brought down to that date, but that it is intended to serve those for whose use it is compiled until that time, when a new edition will probably be published.

Mr. Smith's new plan of making collections at low rates and without the intervention of a third party appears to be this: He has established a union of lawyers residing in various parts of the United States and Canada, a list of whose names he has given in this book, who have agreed with him to receive claims for collection *from subscribers to this book* at certain low rates therein specified. In order to avail themselves of the privilege of having collections made at these rates, subscribers must endorse upon the claim sent for collection these words, "*E. A. Smith's Compendium Rates.*" We do not see that any safe-guard has been established to prevent any one from endorsing these words on his claim, and so availing himself of this privilege, if indeed it is desirable to prevent any one from doing so.

The principal labor of this compilation appears to have been performed by Messrs. Hermann and Rainey of the Saint Louis bar, who, in giving digests of the collection laws of the various states, have had the assistance of competent local attorneys. Messrs. Hermann and Rainey have also contributed a synopsis of banking laws, embracing sixty-two pages, which must prove of great value to bankers and to members of the legal profession. In preparing this, they state that they have followed Mr. Morse only where he is sustained by the decisions of courts of high standing, and where any of his positions have been subsequently rejected by the courts, the cases have been carefully analyzed and referred to.

We recommend this work as one which will be likely to prove of decided advantage to business men, and also to lawyers engaged in commercial collections.

Legal News and Notes.

—THE government of India having failed to secure the conviction of the Guikwar of Baroda, deposed that prince, and, from such information as we have, we suppose that he is now in prison awaiting another trial. For the Marquis of Salisbury, the Secretary of the State for India, has refused him permission to see his solicitors except in the presence of a government official. Thus the government still persists in denying him the ordinary privilege of an accused person. And this is British justice!

—THE CHARLEY ROSS ABDUCTION CASE.—The trial of Westervelt for the kidnapping and harboring and concealing of Charlie Ross, has resulted in a verdict of guilty on three counts. The Legal Intelligencer for September 24 publishes the lengthy charge of Judge Elcock in the case. The learned judge ruled that an indictment for kidnapping a child may contain counts charging the kidnapping, and also the harboring and concealing it with a knowledge that it was enticed away.

—AT the recent meeting of the Association for the Reform and Codification of the Law of Nations, Mr. John Hosack read a paper on the declaration regarding maritime rights appended to the treaty of Paris of 1856. He pointed out that the declaration had led to much discussion both in Europe and America, and that great uncertainty existed as to its true character and its probable effects. The United States had, in the first instance, refused to become parties to the treaty, on the ground that they could not abandon the right of privateering. In England, meanwhile, the shipping interest had taken the alarm, because in the event of war the whole commerce of the country would be transferred to foreign bottoms. A party had consequently arisen which maintained that all private property at sea ought to be as free from capture as private property on land. He maintained that this notion was founded on a singular fallacy, for in no age or country had private property on land ever been respected in time of war. Mr. Hosack asserted that the old rules of maritime war, which were well defined and universally understood, were preferable to the new rules, which he said settled nothing and unsettled everything.

—AT the recent meeting of the Association for the Reform and Codification of the Law of Nations, Mr. Jencken of London read a paper on Negotiable Paper and Paper to Bearer. He dwelt upon the importance of paper to bearer securities, and remarked that while in France and commercial Holland their employment was all but universal, merchants in England had tardily compelled the courts to admit the transferability of paper to bearer, even in the case of bills of exchange. He proposed:—

1. That the minimum value of a bond or share shall be limited to 4*l.* (100 francs).
2. That, after 50 per cent. of the nominal value has been paid up, bonds or scrip to bearer shall be issuable.
3. That they shall be transferable by delivery.
4. That the property conveyed by delivery shall not be hampered by any rights of third parties.
5. That the words "to bearer" shall appear on the face of the instrument itself.
6. And, finally, that no private person shall be allowed to issue paper to bearer.

—A GRAVE QUESTION—"CAN SUCH THINGS BE AND OVERCOME US LIKE A SUMMER CLOUD?"—The following letter to the supreme court is one involving such grave questions that after unsuccessfully wrestling with it, the judges turned it over to the attorney-general. He being unable to come to a decision, has referred it to the governor. It is to be hoped that some conclusion may be reached, as the writer has already been "procrastinated" sufficiently. His being kept out of any office for one year is a serious thing to him. The names of the writer and the city from which he sends forth his grievances are here omitted:

To the Most Respectable Supreme Court of the State of Indiana.

GENTLEMEN:—The undersigned was a professor in Germany and in this country for many years. These two years he was teaching languages in the seminary of the city of——. The board of education, according to decision of the supreme court, illegally elected here, dismissed on account of personal vengeance of one of the members, Professor——, in spite of a large petition of 212 citizens, three-fourths of the inhabitants, signed by the mayor and five councilmen out of six, in favor of re-election of said professor. There is a great loss and damage to the petitioner, because he is for one year without any office, having been procrastinated by said board from days to weeks till last of July. The supplication, therefore, very modestly made to the most respectable supreme court, is what may be done legally for a citizen of the United States to come to his rights and justice after all inquisitions with lawyers?

The Supreme Court's most humble servant, PROF.——

—[*Indianapolis Sentinel.*

—NOVEL incidents appear, now and then, to enliven the practice of law in Southern India, and give occasion to judicial remonstrances such as the following from the judge of the Salem sessions: "Circular No. 10 of 1875. The sessions judge brings to the notice of the district magistrate that a sub-magistrate, in a case committed by him to the court, sent up the head of a sheep which had been severed from its body some three months previous to the special sessions, evidently with a view to its being identified as the head of the animal forming the subject of the theft. The sub magistrate in question evinced an utter want of discretion in sending up this sheep's head, as he must have known, as remarked by the judge, that it would be so decomposed before the commencement of the trial of the accused as to be beyond the possibility of identification. The district magistrate hereby directs all sub-magistrates to use discretion in sending up to the court such things as decomposed sheep's heads, decomposed human bones, decomposed vegetables, and other similar property, in cases committed by them for trial; all the above having, at some time or other, been sent up to the sessions court.—June 29 1875." A short time ago the chief magistrate of another part of the presidency had to remonstrate still more seriously with the head official of a remote village for exercising "undue discretion." It appeared that a stranger, an East Indian died with suspicious suddenness while he was passing through the village. After due consideration and consultation the official determined to have the body decapitated and the head exposed on a pole in the highway "for purposes of identification." This not proving very successful, the head was, after the lapse of three or four days, duly dispatched to the chief station in the district as the "massam" of a probable crime. "Massam" means the chief piece of criminating circumstantial evidence; and it is, according to the notion of the majority of South Indian Hindus, so necessary for conviction that they will prefer a decomposed and unrecognizable "massam" to none at all.

—[*Pall Mall Gazette.*